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DEPARTMENT OF LAW

THE ARMY STAFF COLLEGE

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(Black's Constitutional Law)

	September	
1	1, (P.M.)	To bottom of p. 26; U. S. Constitution—Preamble.
2	4, (P.M.)	To bottom of p. 50; Constitution—Articles V, VI and VII, and Amendment X.
3	8, (P.M.)	To bottom of p. 71.
4	10, (P.M.)	To sec. 68, p. 99; Constitution—Article II and Amendment XII.
5	15, (P.M.)	To bottom of p. 122.
6	17, (P.M.)	To sec. 91, p. 148; Constitution—Article III and Amendment XI.
7	22, (P.M.)	To bottom of p. 166
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9	29, (P.M.)	To middle of p. 218.
	October	
10	1, (P.M.)	To bottom of p. 243.
11	2, (P.M.)	To bottom of p. 290, omitting all of Chapters XI and XII, except secs. 131 to 133, inclusive; Constitution—Article IV.
12	5, (P.M.)	To "Regulation of Railways", p. 350, omitting all of Chapter XIII, except secs. 136 to 140, inclusive.
13	6,)P.M.)	To bottom of p. 374.
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16	12, (P.M.)	To bottom of p. 442, omitting secs. 186 to 192, inclusive.
17	13, (P.M.)	To sec. 205, p. 464; Constitution—Amendments I, II, XIII and XIV.
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19	15, (P.M.)	To "General Warrants". p. 503; Constitution—Amendment IV.
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21	20, (P.M.)	To bottom of p. 539: Constitution—Amendment XV.
22	21, (P.M.)	To bottom of p. 564.

H. A. WHITE,
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OF

American Constitutional Law

BY

HENRY CAMPBELL BLACK, M. A.

Author of Black's Law Dictionary, and of Treatises on Judgments, Tax Titles, Constitutional Prohibitions, Etc.

SECOND EDITION.

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PREFACE TO THE SECOND EDITION.

The first edition of this work having been received with such a gratifying degree of favor by the profession as to exhaust the edition within a comparatively short time after its publication, the author has taken advantage of the opportunity to subject the whole book to a thorough revision. Much new matter has been added, many interesting topics of constitutional law have been more elaborately developed, and suitable reference has been made to the doctrines of the latest and most important decisions. This has resulted in enlarging the book by about eighty pages, but without changing its general plan or scope. It is hoped that it may now enter upon a new and more widely extended career of usefulness.

H. C. B.

Washington, D. C., June, 1897.

PREFACE TO THE FIRST EDITION.

This book is intended primarily for the use of students at law and instructors in the law schools and universities. It contains a condensed review of all the leading principles and settled doctrines of American constitutional law, whether arising under the federal constitution or those of the individual states. These principles and doctrines are stated in the form of a series of brief rules, or propositions, numbered consecutively throughout the book, and are explained, amplified, and illustrated in the subsidiary text, and supported by the citation of pertinent authorities. The necessary limitation of space, as well as the purpose and plan of the work, have precluded any attempt at exhaustive discussion or minute elaboration of the great topics of constitutional law. But the book is believed to be comprehensive of the general subject and sufficiently detailed to

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equip the student with an accurate general knowledge of the whole field. And since the solution of new questions must be sought, not alone in the application of precedents, but also in the settled rules and the accepted canons of interpretation, and since the mind is often best prepared for the investigation of a specific problem by a rapid synoptical review of the results already worked out by the courts in that department to which it belongs, it is hoped that general practitioners may find the book to possess a special value for themselves. It would have been undesirable, even if it were possible, to discuss in these pages all the thousands of reported cases which bear upon the subject of constitutional law. Such an accumulation of authorities would have cumbered the work to the point of destroying its utility. But a very considerable number of the more important and valuable decisions have been suitably referred to, and more, perhaps, than any student would have time or occasion to read. But it was thought that both student and practitioner would appreciate the advantage of being directed to the principal authorities, especially as they may have occasion to study certain special topics with more detail and particularity than the handbook itself could undertake.

The subject of constitutional law is not free from disputed and unsettled questions. In respect to these, the author has invariably stated what he conceives to be the sound rule or the best principle for their interpretation. If his disposition of such topics should at times appear summary, or even dogmatic, it must be ascribed to the necessity for condensation, not to any failure to appreciate the possible arguments on both sides of the question. H. C. B.

Washington, D. C., January, 1895.

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THE CONSTITUTION

OF THE

UNITED STATES OF AMERICA.

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE 1.

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

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The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

SECTION 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments, until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

SECTION 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

SECTION 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the desire of one fifth of those Present, be entered on the Journal.

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Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased, during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

SECTION 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

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To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

SECTION 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

[1] No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

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No Title of Nobility shall be granted by the United States: And no Person holding any Office or Profit or Trust under them shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SECTION 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE II.

SECTION 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The electors shall meet in their respective States, and vote by ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two-thirds of the States. and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who

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have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

SECTION 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers: he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

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SECTION 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III.

SECTION 1. The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE IV.

SECTION 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

SECTION 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of

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the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

SECTION 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

SECTION 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

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ARTICLE VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

DONE in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth. In Witness whereof We have hereunto subscribed our Names.

[Signed by GEORGE WASHINGTON, as President and Deputy from Virginia, and by delegates from all the original states except Rhode Island.]

ARTICLES IN ADDITION TO AND AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE CONSTITUTION.

ARTICLE I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ARTICLE II.

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

ARTICLE III.

No Soldier shall, in time of peace be quartered in any house without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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ARTICLE V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

ARTICLE VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

ARTICLE VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX.

The enumeration in the Constitution. of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

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ARTICLE XI.

The Judicial power of the United States shall not be construed to extend to any suit at law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

ARTICLE XII.

The Electors shall meet in their respective states, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for th'is purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as president, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice President, shall be the Vice President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States.

ARTICLE XIII.

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

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ARTICLE XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President or Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV.

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

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HANDBOOK

OF

AMERICAN CONSTITUTIONAL LAW.

SECOND EDITION.

CHAPTER I.

DEFINITIONS AND GENERAL PRINCIPLES.

1. Constitutional Law Defined.
2-3. Constitution Defined.
4. Meaning of "Constitutional" and "Unconstitutional."
5. Written and Unwritten Constitutions.
6. Constitutions not the Source of Rights.
7. Bills of Rights.
8. Right of Revolution.
9. Political and Personal Responsibility.

CONSTITUTIONAL LAW DEFINED.

1. Constitutional law is that department of the science of law which treats of the nature of constitutions, their establishment, construction, and interpretation, and of the validity of legal enactments as tested by the criterion of conformity to the fundamental law.

CONSTITUTION DEFINED.

2. The constitution of a state is the fundamental law of the state, containing the principles upon which the government is founded, and regulating the division of the sovereign powers, directing to what persons each of those

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powers is to be confided and the manner in which it is to be exercised.[1]

3. In American law, the constitution is the organic and fundamental act adopted by the people of the Union or of a particular state as the supreme and paramount law and the basis and regulating principle of the government.

In public law, a constitution is "the organic and fundamental law of a nation or state, which may be written or unwritten, establishing the character and conception of its government, laying the basic principles to which its internal life is to be conformed, organizing the government, and regulating, distributing, and limiting the functions of its different departments, and prescribing the extent and manner of the exercise of sovereign powers." [2]

Two fundamental ideas are commonly implied in the term "constitution." The one is the regulation of the form of government; the other is the securing of the liberties of the people. But the former only is essential to the existence of a constitution, though the latter has been the principal object of all constitutions established within the last century. Despotism is not inconsistent with a constitution. If, in any given country, it is settled law that the form of government shall be a monarchy, an oligarchy, or a democracy, as the case may be, and that the succession to the exercise of supreme executive power shall be determined in a regular manner, that is enough to make up the constitution of that country. The constitution of Russia establishes the supreme and arbitrary power of the Czar and determines the order of succession to the throne. That of the German Empire prescribes the rule that the King of Prussia shall be Emperor of Germany, and regulates the representation of the component kingdoms and states in the federal legislature. That of the United States establishes a republican form of government and apportions the powers of sovereignty between the Union and the states. But since the formation of the constitution of the United States, and the spread of liberal ideas throughout the civilized world, attendant upon the far-reaching influences of the French Revolution, an era of written constitutions has prevailed. These charters of government, adopted or promulgated not only in North and South America but

[1] 1 Bouv. Inst. 9.

[2] Black, Law Dict. "Constitution."

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also in most of the countries of Europe, as well as Hawaii and Japan, have been largely concerned with guarantying the rights of the governed. If a king has granted a constitution, its prime object has been to admit the people to a share in the government and to secure their liberties against the exercise of despotic authority. If the people of a state have adopted a democratic constitution, none the less have they deemed it important to specify the rights and immunities which they considered sacred and fundamental, and to make sure provision against their invasion by the men in power. Consequently, when we now speak of "constitutional government" or a "constitutional monarchy," it is this latter idea—the security of popular rights and liberties—which is principally dwelt upon.

In American constitutional law, the word "constitution" is used in a very specific sense. It does not include any theories, traditions, or general understandings as to the government or any of its details, which have not been specifically adopted as a part of the written fundamental law. It means the particular written instrument which embodies the whole of the organic law of the state or nation, and which is of supreme authority and force.[3]

Synonyms.

In a certain sense, constitutions may be said to be laws. That is, they are rules of civil conduct prescribed by the supreme power in a state, and are as much within the definition of "laws," in the widest signification of that term, as are the acts of a legislature. Thus, the constitution of the United States is declared to be the "supreme law of the land," no less than the acts of congress passed in pursuance of it. So, also, the same instrument forbids the several states to pass any law impairing the obligation of contracts, and declares that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; and it is held that these clauses do not relate solely to the acts

[3] "A constitution is, according to the American idea, the organization of the government, distributing its powers among bodies of magistracy, and declaring their rights, and the liberties reserved and retained by the people." French v. State, 52 Miss. 759. "The constitution of an American state is the supreme, organized, and written will of the people acting in convention, and assigning to the different departments of the government their respective powers." Taylor v. Governor, 1 Ark. 21.

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of a state legislature, but that a state constitution or an amendment thereto is as much a "law," within their purview, as any statute. But in practice a distinction is made between those organic or fundamental laws which are called "constitutions" and such ordinary laws as are denominated "statutes." Both answer to the description of laws, but constitutions are seldom called "laws," and never called "statutes."

A constitution differs from a statute or act of a legislature in three important particulars:

(1) It is enacted by the whole people who are to be governed by it, instead of being enacted by their representatives sitting in a congress or legislature.

(2) A constitution can be abrogated, repealed, or modified only by the power which created it, namely, the people; whereas a statute may be repealed or changed by the legislature.

(3) The provisions of a constitution refer to the fundamental principles of government, or the establishment and guaranty of liberties, instead of being designed merely to regulate the conduct of individuals among themselves. But the tendency towards amplification, in modern constitutions, derogates from the precision of this last distinction.

MEANING OF "CONSTITUTIONAL" AND "UNCONSTITUTIONAL."

4. "Constitutional" means conforming to the constitution. A statute or ordinance which is inconsistent with the constitution, or in conflict with any of its provisions, is said to be "unconstitutional."

The term "constitutional" means consistent with the constitution; authorized by the constitution; not conflicting with any provision of the constitution or fundamental law of the state. It also means dependent upon a constitution, or secured or regulated by a constitution; as a "constitutional monarchy," "constitutional rights." Hence, in American parlance, a constitutional law is one which is consonant to and agrees with the constitution; one which is not in violation of any provision of the constitution of the United States

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or of the particular state. An unconstitutional law is one which is in violation of the constitution of the country or of the state. In those states where the same body which exercises the ordinary lawmaking power is also invested with the whole sovereignty of the nation, as is the case in Great Britain, an unconstitutional enactment is not necessarily void. There are many rules, precedents, and statutes, deemed a part of the British constitution, which are justly esteemed as valuable safeguards of liberty. But there is no one of them which parliament might not lawfully repeal. The Habeas Corpus Act, for example, might at any day be abrogated by act of parliament. Such a measure would be regarded as unconstitutional, because it would be in derogation of certain principles which are universally deemed a part of the constitution as it now stands. But it would not lack the sanction of legality. It would occupy precisely the position of an amendment to a written constitution, and would be no less the law of the land than had been the law which it destroyed. But in a country governed by a written constitution, which is of supreme authority over the lawmaking power, and to which all ordinary legislation must bend, an unconstitutional law is void and of no effect, and in fact is no law at all. Yet, so long as it stands on the statute book unrepealed, it will have the presumptive force of law, unless the proper courts have pronounced its invalidity. Until that time, any person may disregard it at his own peril, but officers are bound to give it force and effect. After it has been duly adjudged unconstitutional, the presumption is that no further attempt will be made to enforce it. But the protection of the individual rests on the probability that the courts will abide by their first decision in regard to the law.

WRITTEN AND UNWRITTEN CONSTITUTIONS.

5. Constitutions are classified as written and unwritten. All the American constitutions, national and state, belong to the class of written constitutions.

Among the various constitutional governments of the world, it is customary to make a distinction between those which possess a "written" constitution and those which are governed by an "unwritten" constitution. The distinction, however, is not very exact. It is difficult to conceive of a constitution which should be wholly

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unwritten. Practically, this term means no more than that a portion of what is considered to belong to the constitution of the country has never been cast in the form of a statute or charter, but rests in precedent or tradition. The so-called unwritten constitution of Great Britain consists, in large measure, of acts of parliament, royal grants and charters, declarations of rights, and decisions of the courts. It also comprises certain maxims, principles, or theories of government which, though not enacted with the force of law, have always been acquiesced in by the people and acted upon by the rulers, and thus, possessing historic continuity, may be said to enter into the fundamental conception of the nature and system of the government. The differences between written and unwritten constitutions, as these terms are generally employed, are chiefly as follows: First. A written constitution sums up in one instrument the whole of what is considered to belong to the constitution of the state; whereas, in the case of an unwritten constitution, its various parts are to be sought in diverse connections, and are partly statutory and partly customary. Second. A written constitution is either granted by the ruler or ordained by the people at one and the same time; while an unwritten constitution is gradually developed, and is contributed to not only by the executive and legislative branches of government, but also by the courts, and by the recognition, by rulers and people, of usages and theories gradually acquiring the force of law. Third. A written constitution is a creation or product, while an unwritten constitution is a growth. The one may be influenced, in its essentials, by history, but is newly made and set forth. The other is not only defined by history, but, in a measure, is history. Fourth. A written constitution, in its letter, if not in its spirit, is incapable of further growth or expansion. It is fixed and final. An unwritten constitution, on the other hand, will expand and develop, of itself, to meet new exigencies or changing conditions of public opinion or political theory. Fifth. A written constitution, at least in a free country, is a supreme and paramount law, which all must obey, and to which all statutes, all institutions, and all governmental activities must bend, and which cannot be abrogated except by the people who created it. An unwritten constitution may be altered or abolished, at any time or in any of its details, by the lawmaking power.

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Contents of Written Constitutions.

As to the contents of a written constitution, the lines of definition are not very clear. It is by no means easy to say, as a matter of abstract theory, what such an instrument must contain in order to be a complete constitution, or what kinds of provisions are essential to it, and what foreign or superfluous. So far as regards a constitution for one of the United States, if it established a representative government, republican in form, provided for the three necessary departments of government, fixed rules for the election and organization of the legislative department and the executive offices, defined and guarantied political rights, and secured the liberty of the individual in those particulars which are generally esteemed fundamental, it would probably be sufficient. On the other hand, there is practically no limit to the subjects or provisions which may be incorporated in the constitution. It might, for example, be made to include a code of civil or criminal procedure. The question in every case is how much the framers of the particular constitution are willing to leave to the legislative discretion, and what matters they desire to put beyond the reach of the legislature, in respect to their change or abolition. Whatever is enacted in the form of law by a legislature may be repealed by the same or a succeeding legislature. But what is incorporated in a constitution can be repealed only by the people. And the people, sitting in a constitutional convention, may put into their constitution any law, whether or not it has relation to the organization of the state, the limitation of governmental powers, or the freedom of the citizen, which they deem so important as to make it desirable that it should not be easily or hastily repealed. Of late years there is a very noticeable tendency towards longer and more elaborate constitutions, and towards the incorporation into them of many matters which properly have no relation to the idea of a fundamental organic act, but are intended as limitations upon legislative power. This disposition probably arises from a growing distrust of the wisdom and public spirit of the state legislatures, and also from a desire of the people to make their constitutions the means of bringing about reforms which a majority of them consider desirable, and are unwilling to trust to the slower and less certain action of the legislature.

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CONSTITUTIONS NOT THE SOURCE OF RIGHTS.

6. The constitutions of the American states are grants of power to those charged with the government, but not grants of freedom to the people. They define and guaranty private rights, but do not create them.

The state constitutions in this country grant and limit the powers of the several departments of government, but, generally speaking, they are not to be considered as the origin of liberty or rights. In a later chapter, when we come to consider the nature of liberty and of natural, civil, and political rights, it will be shown that some personal rights are taken up into the sphere of law and obtain effective recognition only by the constitution, and that certain political rights are directly created by that instrument. But with more particular reference to the rights called "natural," it must now be remarked that they exist before constitutions and independently of them. Constitutions enumerate such rights and provide against their deprivation or infringement, but do not create them. It is supposed that all power, all rights, and all authority are vested in the people before they form or adopt a constitution. By such an instrument, they create a government, and define and limit the powers which its agencies are to exercise, and they also specify the rights which the constitution is to secure and the government respect. But they do not thereby invest the citizens of the commonwealth with any natural rights which they did not before possess. This is shown by the provision found in the constitutions of many of the states that the enumeration, in the bill of rights, of particular rights or privileges shall not be construed to impair or derogate from others retained by the people.

Sources of American Constitutional Law.

The system of government established by the constitution of the United States has no exact historical precedent. It was, in a sense, a creation and an experiment. But the framers of the constitution, though without a model for the whole structure, were guided, in respect to many details, by the experience and wisdom of other countries. To a very considerable degree, their action was determined by theories and ideas inherited from the mother country;

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and our constitution owes many of its provisions to that of Great Britain, as the latter then stood. Thus, the idea of a representative government, instead of a direct democracy, the principle of majority rule, the necessity of separating the three departments of government, the bicameral system in legislation, the doctrine of local self-government, and the balancing of centrifugal and centripetal forces,—all these principles, and more, were incorporated into our constitution as a matter of course and because they were essential parts of the Anglo-American idea of government. Some further ideas were borrowed by the framers of the constitution from the constitutions then existing in several of the states, and some, it is probable, from ancient history. Many provisions of the constitution, as is well known, were no more than compromises, necessary to be made in order to secure a sufficient adherence to make its ratification by the states probable. Almost without exception,[4] the great guaranties which secure the natural, civil, and political rights of the citizen, and protect him against tyranny or oppression, were derived from the great charters and legislative enactments of Great Britain which had become a fixed part of her constitution, or from the common law, which the Americans claimed as their natural heritage and shield.[5] Among these rights we

[4] The prohibition against "laws impairing the obligation of contracts" does not appear to have been derived from any known source. Its origin is certainly not to be found in the common law or any British statute. It was devised by the framers of the constitution as a means of securing the inviolability of private contracts against legislative interference, and was considered necessary in view of certain circumstances in the financial and political history of the times. Black, Const. Prohib. §§ 2, 3. As to religious freedom and the liberty of the press, these important rights cannot be said to have attained in England, at the time of the formation of our constitution, such a degree of security as they have since won. But the need of making secure provision for them was undoubtedly suggested to the founders of our government by the struggles which were even then going on in the mother country; and they established, at once and for the whole United States, such a fullness of freedom, in these particulars, as the English people have as yet scarcely worked out for themselves.

[5] "The universal principle (and the practice has conformed to it) has been that the common law is our birthright and inheritance, and that our ancestors brought hither with them upon their emigration all of it which was applicable to their situation. The whole structure of our present jurisprudence

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may mention that of "due process of law," of trial by jury, of the benefit of the writ of habeas corpus, of security against unreasonable searches and seizures, and many of the rights secured to persons on trial for criminal offenses. The several states, in framing their constitutions, have been guided and influenced by the same theories and doctrines, and by the prevalence of the same political ideas among the people, and also in later times, and to a very considerable degree, by the constitution of the United States.

BILLS OF RIGHTS.

7. A bill of rights is a formal declaration, in a constitution, of the fundamental natural, civil, and political rights of the people which are to be secured and protected by the government.

A bill of rights is in the nature of a classified list of the rights and privileges of individuals, whether personal, civil, or political, which the constitution is designed to protect against governmental oppression, containing also the formal assurance or guaranty of these rights. It is a charter of liberties for the individual, and a limitation upon the power of the state. Such declarations are found in all the state constitutions. And the lack of a bill of rights was one of the objections to the federal constitution most strongly urged when it was before the people for their ratification. Very soon after the adoption of the constitution, this defect was remedied by the adoption of a series of amendments, of which the first eight may be said to constitute the federal bill of rights. These guaranties, however, as will more fully appear

stands upon the original foundations of the common law." 1 Story, Const. § 157. In the Declaration of Rights put forth by the Continental Congress in 1774 was the following clause: "The respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage according to the course of that law." The English common law, in so far as it is applicable in this country, and where it has not been abrogated or changed by constitutional or statutory enactments, is in force in the several American states. Black, Interp. Laws, 231; Marburg v. Cole, 49 Md. 402; Hollman v. Bennett, 44 Miss. 322; Van Ness v. Pacard, 2 Pet. 137.

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in another connection, were intended to operate only as a limitation upon the federal power, and not to impose any restrictions on the action of the several states. The idea, as well as the name, of a bill of rights, was undoubtedly suggested by certain great charters of liberty well known in English constitutional history, and particularly the "Bill of Rights" passed in the first year of the reign of William and Mary, A. D. 1689.

RIGHT OF REVOLUTION.

8. The right of revolution is the inherent right of a people to cast out their rulers, change their polity, or effect radical reforms in their system of government or institutions, by force or a general uprising, when the legal and constitutional methods of making such changes have proved inadequate, or are so obstructed as to be unavailable.

This right is a fundamental, natural right of the whole people, not existing in virtue of the constitution, but in spite of it. It belongs to the people as a necessary inference from the freedom and independence of the nation. But revolution is entirely outside the pale of law. "Inter armes silent leges." Circumstances alone can justify a resort to the extreme measure of a revolution. In general, this right may be said to exist when tyranny or a corrupt and vicious government is intrenched in power, so that it cannot be dislodged by legal means; or when the system of government has become intolerable for other causes, and the evils to be expected from a revolutionary rising are not so great as those which must be endured under the existing order of things; when the attempt is reasonably certain to succeed; and when the new order proposed to be introduced will be more satisfactory to the people in general than that which is to be displaced. "Revolution is either a forcible breach of the established constitution or a violation of its principles. Thus, as a rule, revolutions are not matters of right, although they are mighty natural phenomena, which alter public law. Where the powers which are passionately stirred in the people are unchained, and produce

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a revolutionary eruption, the regular operation of constitutional law is disturbed. In the presence of revolution, law is impotent. It is, indeed, a great task of practical politics to bring back revolutionary movements as soon as possible into the regular channels of constitutional reform. There can be no right of revolution, unless exceptionally; it can only be justified by that necessity which compels a nation to save its existence or to secure its growth where the ways of reform are closed. The constitution is only the external organization of the people, and if, by means of it, the state itself is in danger of perishing, or if vital interests of the public weal are threatened, necessity knows no law." [6]

POLITICAL AND PERSONAL RESPONSIBILITY.

9. Generally speaking, the responsibility for political action is political only. That is, officers of the government, in either of its branches, are not liable at the suit of private parties for the consequences of acts done by them in the course of their public functions and in matters involving the exercise of judgment or discretion.

In order to the due administration of government, it is necessary that the officers who are charged with the various duties of making, interpreting, and administering the laws should enjoy a due measure of immunity from being called to account for their public acts at the instance of private parties. Misgovernment is to be remedied at the ballot box, not by suits at law. If the legislature attempts to violate or defy the constitution, it will be held in check by the judicial department. But for unwise or oppressive laws, not conflicting with the constitution or private rights, there is no redress save by the election of a new legislature. Courts cannot set aside a statute regularly passed, on the ground that it was procured by bribery, fraud, or corruption. And if individuals suffer detriment by reason of the laws enacted, they have no right of action against the members of the legislative body. "It certainly cannot be argued," says the court in Mississippi, "that the motives of the members of a legislative assembly, in voting for a particular law, can be inquired

[6] Bluntschli, Theory of the State, 477.

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into, and its supporters be made personally liable, upon an allegation that they acted maliciously towards the person aggrieved by the passage of the law."[7] And so, also, whenever the officers of a municipal corporation are vested with legislative powers, they hold and exercise them for the public good, and are clothed with all the immunities of government, and are exempt from all liability for their mistaken use, although they may be held responsible if shown to have acted corruptly.[8]

The judiciary are invested with a like privilege. Judges of inferior courts may be compelled, by appropriate process, to perform the duties laid upon them. But no judge can be held liable, at the suit of a private person, for any action taken or omitted by him, or decision rendered, in the exercise of his office of judge and of his judicial discretion, even though he acted with malice or corruptly, provided he kept within the bounds of his jurisdiction, which, in the case of superior courts, will be presumed.[9] For gross abuses of power or malversation in office, on the part of the judiciary, the remedy is by impeachment.

A similar immunity protects the high officers of the executive department. They may be controlled in the performance of merely ministerial duties, involving the ascertained rights of individuals, by the process of the courts. But actions do not lie against them for damages sustained by private persons in consequence of their political or public acts.[10] "Where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more per-

[7] Jones v. Loving, 55 Miss. 109.

[8] Borough of Freeport v. Marks, 59 Pa. St. 253; Jones v. Loving, 55 Miss. 109; Amperse v. Winslow, 75 Mich. 234, 42 N. W. 823; Walker v. Hallock, 32 Ind. 239.

[9] Fray v. Blackburn, 3 Best & S. 576; Calder v. Halket, 3 Moore, P. C. 28; Barnardiston v. Soame, 6 How. St. Tr. 1063; Hamond v. Howell, 2 Mod. 218; Houlden v. Smith, 14 Q. B. 841; Scott v. Stansfield, L. R. 3 Exch. 220; Kemp v. Neville, 10 C. B. (N. S.) 523; Bradley v. Fisher, 13 Wall. 335; Shoemaker v. Nesbit, 2 Rawle, 201; Allec v. Reece, 39 Fed. 341.

[10] Mississippi v. Johnson, 4 Wall. 475; Marbury v. Madison, 1 Cranch, 137; Macbeath v. Haldimand, 1 Term R. 172; Gidley v. Lord Palmerston, 3 Brod. & B. 275; Grant v. Secretary of State, 2 C. P. Div. 445.

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fectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy." [11] To illustrate, the right of removal from office is an executive power, for the exercise of which, generally, there can be no responsibility save such as is political. Thus, when the incumbent of an office is dismissed, he cannot maintain an action for damages against the officer or officers who exercised the right to remove him, unless he can show that malice and a desire to injure him were the impelling motives of their action.[12] On similar principles, public agents, military or civil, of foreign governments (even revolutionary governments) cannot be held responsible, in any court within the United States, for acts done within their own states, in the exercise of the sovereignty thereof, or pursuant to the directions of their governments.[13] In matters of contract the rule is that a public officer who does not interpose his own credit is not liable on a contract executed by him on behalf of the state, even in cases where he might have been liable had he represented a private party; and where it is sought to charge him with a personal responsibility, the facts and circumstances must be such as to show clearly that both parties acted upon the assumption that a personal liability was intended.[14] In the case of high executive officers, as in the case of the judges, great misbehavior is ground for impeachment and removal from office.

With regard to inferior officers, the rule is that they are not responsible at the suit of private parties for acts done by them in obedience to lawful commands, or in the bona fide and honest exercise of a discretion with which the law invests them, but they must not use their official authority to inflict wanton or malicious injury upon others, nor neglect the duties which the law requires them to perform for the benefit of those who have a right to demand their services. Where a ministerial officer, for example, acts in accord-

[11] Marbury v. Madison, 1 Cranch, 137, 166.

[12] Burton v. Fulton, 49 Pa. St. 151.

[13] Underhill v. Hernandez, 13 C. C. A. 51, 65 Fed. 577.

[14] New York & C. S. S. Co. v. Harbison, 16 Fed. 688; Parks v. Ross, 11 How. 362; Hodgson v. Dexter, 1 Cranch, 345.

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ance with the directions of a writ, due and regular in form and issuing from a court of competent jurisdiction, and does not exceed its mandates, the law protects him against personal liability for the consequences of his acts, although they work injury to private rights.[15] But not so if he uses his official position or the process of the courts to oppress or injure persons from private motives or for private gain. A postmaster who receives a letter with directions to send it by registered mail, and does not register it, whereby the letter is lost, is liable in damages to the sender.[16] And so, in general, is any officer whose services the public have a right to demand, and who unjustifiably neglects or refuses to perform the duties laid upon him by law.

[15] Sample v. Broadwell, 87 Ill. 617; Watson v. Watson, 9 Conn. 140; Wilmarth v. Burt, 7 Metc. (Mass.) 257.

[16] Fitzgerald v. Burrill, 106 Mass. 446.

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CHAPTER II.

THE UNITED STATES AND THE STATES.

10–11. Nature of the American Union.
12. Sovereignty and Rights of the States.
13. Sovereignty of the People.
14. Form of Government in the United States.
15. The Union Indestructible.
16. Nature of the Federal Constitution.
17. The Constitution as a Grant of Powers.
18. The Constitution as the Supreme Law.

NATURE OF THE AMERICAN UNION.

10. The United States of America is a nation, possessing the character and attributes of sovereignty and independence.

11. Politically speaking, the United States is a union of separate commonwealths, called "states." Territorially it includes:

(a) The states.

(b) The territories.

(c) The District of Columbia.

Definition of "Nation."

A nation is a people, or aggregation of men, existing in the form of an organized jural society, inhabiting a distinct portion of the earth, speaking the same language, using the same customs, possessing historic continuity, and distinguished from other like groups by their racial origin and characteristics, and generally, but not necessarily, living under the same government and sovereignty. Besides the element of autonomy or self-government, that is, the independence of the community as a whole from the interference of any foreign power in its affairs or any subjection to such power, it is further necessary to the constitution of a nation that it should be an organized jural society, that is, both governing its members by regular laws, and defining and protecting their rights, and re-

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specting the rights and duties which attach to it as a constituent member of the family of nations.

The word "nation" is to be distinguished from the related terms "people," "state," and "government." The people constitute the nation. But when we speak of the people, we use the term to designate those who live within the territory of the nation and who belong to it by such residence and by race and community of customs and characteristics, without implying the idea of government. The word "nation" adds to this conception the idea that the "people" are organized into a jural society and occupy a position among the independent powers of the earth. But the term "nation" is more nearly synonymous with "the people" than is the word "state." The last term denotes a single homogeneous political society, or body politic, organized and administered under one government and one system of law. It is not so much used to characterize the inhabitants of the country, as to convey the idea of the government as a unit. A nation may be politically divided into several states, as was formerly the case in Italy. And conversely, one state may comprise several nations or parts of nations, as is the case in the Austro-Hungarian Empire. But such conditions are anomalous. Normally, the nation and the state are the same. The word "government" is properly used to denote either the act of administering the political affairs of a state, or the system of polity therein prevailing, or the aggregate of persons who, for the time being, are intrusted with the administration of the executive, legislative, and judicial business of the state.

The United States a Nation.

From the foregoing it will easily be seen that the United States, considered as a unit, possesses all the characteristics and attributes, and is entitled to the designation, of a nation. It is composed of one people, united by language, customs, laws, and institutions, as well as by birth on the soil or adoption into the family of native citizens. It has the character of an organized jural society, governed, in all things concerning the whole people, by one system of law and one constitution. It occupies a distinct portion of the earth's surface. It acknowledges no political superior. It has also an inherent and absolute power of legislation; for a moment's reflection will show that the present apportionment of leg-

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islative power between the United States and the states rests solely on the will of the people, who constitute the nation.

Definition of "Sovereignty."

The term "sovereignty" denotes the possession of sovereign power or supreme political authority, including paramount control of the constitution and frame of government and its administration. It is the self-sufficient source of political power, from which all specific political powers are derived. It describes the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation.[1] "In the intercourse of nations, certain states have a position of entire independence of others, and can perform all those acts which it is possible for any state to perform in this particular sphere. These same states have also entire power of self-government, that is, of independence of all other states so far as their own territory and citizens not living abroad are concerned. No foreign power or law can have control except by convention. This power of independent action in external and internal relations constitutes complete sovereignty."[2]

Two Aspects of Sovereignty.

It will be perceived that sovereignty has two sides or aspects, the external and the internal. On the external side, it means that the state spoken of is not subject to the control, dictation, or government of any other power. It necessarily implies the right and power to receive recognition as an independent power from other powers, and to make treaties with them on equal terms, make war or peace with them, send diplomatic agents to them, acquire territory by conquest or occupation, and otherwise to manifest its freedom and autonomy. As the individual, in a free country, is the equal of all his fellow citizens in civil and political rights, though perhaps not in ability, influence, or power, so the sovereign state is the equal of all other states in the family of nations, in respect to its rights, though not in its prestige, territory, or power.[3] All independent states are bound by the rules of international law. But this law is established by their concurrent consent, and as it

[1] Black, Law Dict. "Sovereignty." [2] 1 Wools. Pol. Science, p. 204.
[3] The Antelope, 10 Wheat. 66, 122.

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operates upon all alike, it is no derogation from the sovereignty of any. On the internal side, sovereignty implies the power of the state to make and alter its system of government, and to regulate its private affairs, as well as the rights and relations of its citizens, without any dictation, interference, or control on the part of any person or body or state outside the particular political community. Every statute is a manifestation of sovereignty. But where the country is governed under a written constitution, intended to endure against all change except by the solemn expression of the will of the people, the ultimate test of sovereignty must be found in the right and power to alter the constitution of government at will. If this power is possessed by the people of the particular state, or by any determinate persons or body within the state, free from all interference by any exterior power and from the binding force of the constitution or laws of any exterior power, then the state is entitled, in this respect, to be called a sovereign state, and that power or body within the state which possesses this power to change the constitution is the sovereign therein.

Sovereignty of the United States.

The United States possesses the character of a sovereign nation. The constitution confides to the general government plenary control over all foreign relations. The power to make treaties, send ambassadors and consuls, declare war and make peace, to regulate foreign commerce, to establish a uniform rule of naturalization, to define and punish offenses against the law of nations, to maintain an army and a navy, and generally to act as a nation in the intercourse of nations, is confided to the national authority alone. Moreover, the United States, as a political community, possesses absolute and uncontrolled power of legislation as concerns its internal affairs. That it could not be interfered with in the exercise of this power by any foreign power or by any one of the component states, is self-evident. Nor is it any objection to this proposition that the constitution, as it stands at present, has limited the sphere of operations of the national government. For the same power which established the constitution, namely, the people of the United States, could change it at will. It is no derogation from the powers of sovereignty that the body in which resides the

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ultimate sovereign power has chosen to restrict the legislative power which it grants to its representatives. At present, certain matters are not intrusted to the regulation of congress, but are left to the action of the several states. But there can be no question that all such matters, if it should seem good to the people, might be withdrawn from the sphere of state activity, and placed under the paramount control of the Union. An inherent supreme power of legislation resides in the people who possess the sovereignty of the United States.

The States.

In American constitutional law the word "state" is generally employed to denote one of the component commonwealths of the American Union. These states, as will presently appear, are not sovereign. Neither are they nations, in any proper sense of the term. They are political communities, occupying separate territories, and possessing powers of self-government in respect to almost all matters of local interest and concern. Each, moreover, has its own constitution and laws and its own government, and enjoys a limited and qualified independence.

The Territories.

The position of the territories, in our system of government, is somewhat analogous to that of colonial dependencies, though it finds no exact parallel in past or contemporary history. The territories are not states of the Union. They do not possess full powers even of local self-government. They are subject to the exclusive jurisdiction and legislation of congress, although they are practically intrusted with a considerable measure of authority in respect to the government of their purely local affairs. Their officers are appointed by the President, and the acts of their legislative assemblies are liable to be overruled or annulled by the federal legislature. It may be said that they are held in tutelage by the general government; that their territorial condition is transitory and that their system of government is temporary and provisional only. For it is always understood that the people of a territory are destined to create and maintain a state government as soon as, in the judgment of congress, they shall be prepared therefor, and be admitted to the Union on an equality with the older states. "The territories

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are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective states, and congress may legislate for them as a state does for its municipal organizations. The organic law of a territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the territorial authorities; but congress is supreme, and for the purposes of this department of its governmental authority, has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the constitution."[4]

The District of Columbia.

The position of the District of Columbia is even more peculiar than that of the territories. In fact, it constitutes the most singular anomaly in our political systems. The District is that portion of territory ceded to the United States for a site for the national capital. It is subject to the exclusive jurisdiction of congress. It is neither a state nor a territory. Its people have no direct participation in the government, even in respect to the administration of municipal affairs. Its executive department consists of a board of three commissioners who are appointed by the President of the United States with the advice and consent of the senate. Its judges are appointed in like manner. Its local legislature is congress. Its permanent residents are citizens of the United States, if they fulfill the conditions of citizenship laid down in the fourteenth amendment, but they are not citizens of any state.

Restricted Meaning of the Term "State."

When the word "state" is to be taken in its more restricted sense, as designating one of the component states of the Union, there is often some difficulty in determining its exact limits. This ambiguity arises chiefly in connection with the peculiar position of the territories and the District of Columbia. It may be stated, as a general rule, that the term "state" may include the territories and the District when used geographically, but not when used politically. And while these communities are not technically "states" of the Union, as the term is used in the constitution, yet they may be held

[4] National Bank v. County of Yankton, 101 U. S. 129.

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to come under that designation, as used in treaties and acts of congress, if plainly within their spirit and meaning. For instance, in the internal revenue acts of congress it is provided that the word "state" shall include the territories and the District of Columbia, whenever such construction is necessary to carry out their provisions.[5] So the term "state," in an act of congress regulating the taking of pilots on water forming the boundary between two states, includes an organized territory of the United States.[6]

SOVEREIGNTY AND RIGHTS OF THE STATES.

12. The several states have not the attribute of sovereignty, except in a limited and qualified sense. They are local self-governing communities, independent as respects each other, independent in a limited and qualified sense as respects the Union, but not ranking as nations or sovereign powers for the purposes of international law.

State Sovereignty.

The several states composing the American Union never enjoyed complete sovereignty as regards the external side, and do not now possess it. This is shown by the fact that they were always subject to some common superior in respect to their relations with foreign powers. First it was the king and parliament of England, then the revolutionary congress, then the confederation, and now the United States. For as all authority over foreign relations and affairs is confided to the national government, it follows as a necessary consequence that all such authority is denied to the separate states. None of them can deal directly with a foreign nation. "The only government of this country which other nations recognize or treat with is the government of the Union, and the only American flag known throughout the world is the flag of the United States."[7] On the external side, therefore, we may entirely dismiss the notion of any state sovereignty. An apparent exception may be found in the case of Rhode Island and North Carolina, which

[5] Rev. St. U. S. § 3140. [6] The Ullock, 19 Fed. 207.

[7] Fong Yue Ting v. U. S., 149 U. S. 698, 13 Sup. Ct. 1016; 1 Story, Const. § 212.

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remained out of the Union for a short time after the national government was organized, and thus acquired complete independence, and also in the case of Texas, which was a sovereign and independent republic at the time of its admission. But the two former states never sought or obtained recognition from any foreign government, nor exercised any act of external sovereignty. And the latter state, on coming into the Union, surrendered all such powers and rights as were incompatible with its new rank and position as one of the states. None of these states, therefore, now possesses any sovereignty except such as may be enjoyed by all the states alike.

But the question of state sovereignty is not determined alone with reference to external relations. It also depends in a measure upon the relation of the states to each other and to the Union, and on their internal powers of legislation. "As applied to a state within a federation, as one of the United States, or a kingdom or duchy of the German Empire, the term 'sovereign' signifies that the community referred to is the political equal in the federation of each of the other members. Not that it may have in all respects the same weight in the federal councils, but that its political tie with the others is alone through the federal government, and but for that tie the states would be independent of one another." [8] We may say, therefore, that, as respects each other, the several states of the Union enjoy a qualified sovereignty. It is not an absolute sovereignty, even here, because they cannot make treaties with each other (unless with the consent of congress), and there are numerous particulars in which the relation of the states is regulated by the federal constitution. In all such matters as the effect of judicial proceedings, the extradition of criminals, and the privileges of citizens, the several states are not at liberty to deal with each other as independent communities.

Again, as regards the relation of the several states to the Union, it may be said that each state enjoys a qualified and relative sovereignty. "Not every subjection of a state," says Bluntschli, "destroys its sovereignty completely, since the dependence may not be absolute. In composite states, confederations, federal states,

[8] Crane & M. Compar. Pol. 38.

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and federal empires, the particular states, although in certain respects subordinated to the whole, yet have a relative sovereignty limited in extent but not in content. Thus in Switzerland, cantonal sovereignty is distinguished from federal sovereignty; similarly in North America and in the German Empire, there is a difference between the sovereignty of the Union or Empire and that of the federated states."[8] The practical description of the manner of this apportionment of sovereign power which has been agreed on by statesmen and courts is that each state retains plenary authority over those matters which have not been confided to the general government by the constitution nor prohibited to the states, and that the Union possesses plenary authority over those subjects which the constitution intrusts to its regulation.

Finally, in respect to the regulation of their own system of government and internal affairs, the states possess no more than a limited or qualified sovereignty. The ultimate test of sovereignty, in this respect, as we have already said, is the power to alter the constitution at will. But this the states cannot do. For there are numerous provisions of the federal constitution which impose limitations upon the power of the states, as well in the making or changing of constitutions as in the enactment of laws. For example, no state, in adopting or amending a constitution, could establish anything but a republican form of government, or abridge the privileges of citizens of the United States, or impair the obligation of contracts.

State Rights.

The rights of the several states of the Union, possessed and to be enjoyed by them as such, are political and governmental in their nature. They consist in such a degree of autonomy and such powers of free action and of regulation of their own affairs as may not be inconsistent with the nature of the relation of the Union to each of the states, nor with the exercise of those powers which are confided, by the constitution, to the federal government. They embrace all those powers which were possessed by the several states at the time of the adoption of that constitution, with the exception of such as are therein delegated to the central authority,

[8] Bluntschli, Theory of the State, 475.

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or thereby prohibited to the states. But it is evident that, within the limits of this definition, there is room for great difference of opinion in details. And in fact, ever since the foundation of the Union, two schools of statesmen have been found, divided in their views on the nature and boundaries of state rights. According to one school, the federal constitution is to be subjected to a strict construction in respect to the powers granted to the national government and a liberal interpretation for the preservation of the autonomy of the states. According to the other school, the rule of interpretation is to be reversed. Those holding the one opinion contend that the government of the Union should be held strictly to the exercise of the powers expressly granted to it, and that its province and jurisdiction should not be enlarged by implication. According to the other party, the true theory of our government and institutions is in favor of such a construction of the constitution as will give the federal government the largest measure of power which is compatible with the continued and useful existence of the states. By them the nation is regarded as the only sovereign power, and they contend that it should be accorded all such rights and powers as may be convenient to enable it to discharge its functions as such and to maintain its place among the nations of the earth. The extreme advocates of the one view have maintained that it was within the rightful power of a state to nullify (that is, refuse submission to, and resist by any adequate force) any act of the general government which, in the judgment of that state, was contrary to the constitution or beyond the boundaries of the legitimate power of the Union. These theorists also contended that a state possessed the power and the right to withdraw from the Union and set up a new government, either alone or with other states which might follow its example, whenever, in its judgment, its own interests required such a dissolution of the tie which bound it to the other states. On the other hand, statesmen of the other party have gone so far as to regard the several states as mere emanations from the Union, and as standing in the same relation to it which is occupied by the municipal corporations of a state towards the state. Between these two extremes lies the truth. Although the two theories of construction, strict and liberal, still subsist, it is now quite generally agreed that both the several states and the

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Union are supreme, each within its own appropriate sphere; that the rights of the individual state and of the Union are equally necessary to be preserved and must be accommodated to each other; that the authorities of the Union are to judge of the extent of the powers granted to it; that the rightful autonomy of each state is beyond the reach of federal interference; and that the Union is perpetual and indissoluble.

SOVEREIGNTY OF THE PEOPLE.

13. In America, sovereignty resides in the people. But the people here meant are the qualified electors, or a majority of them, and they can exercise their sovereign power only in the modes pointed out by their constitutions.

The word "people" may have various significations according to the connection in which it is used. When we speak of the rights of the people, or of the government of the people by law, or of the people as a non-political aggregate, we mean all the inhabitants of the state or nation, without distinction as to sex, age, or otherwise. But when reference is made to the people as the repository of sovereignty, or as the source of governmental power, or to popular government, we are in fact speaking of that selected and limited class of citizens to whom the constitution accords the elective franchise and the right of participation in the offices of government. The people, in this narrow sense, are the "collegiate sovereign" of the state and the nation. But the sovereign can exercise his sovereign powers only in the mode pointed out by the organic law which he has himself ordained. This will be shown more fully in a subsequent chapter, in connection with the question of the power of the people to revise and amend their constitutions.[10]

[10] See infra, p. 46.

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FORM OF GOVERNMENT IN THE UNITED STATES.

14. The government of the United States is a federal government. The United States is a republic, and so also is each of the states, the form of government being representative.

Federal Government.

The American Union is commonly described as a federal government. And political writers and jurists usually speak of the federal constitution, the federal courts and jurisdiction, federal powers, the federal executive, etc. The use of this term is not made imperative by anything in the constitution. The nature of the government is not described therein. Nor can its employment settle anything as to the nature or powers of the government. But the term expresses the common understanding as to the kind of government prevailing in our country. And it is a correct designation, technically, if taken in its true sense. There is, in political science, a substantial difference between a confederation and a federal government. The former term denotes a league or permanent alliance between several states, each of which is fully sovereign and independent, and each of which retains its full dignity, organization, and sovereignty, though yielding to the central authority a controlling power for a few limited purposes, such as external and diplomatic relations. In this case, the component states are the units, with respect to the confederation, and the central government acts upon them, not upon the individual citizen. In a federal government, on the other hand, the allied states form a union, not indeed to such an extent as to destroy their separate organization or deprive them of quasi sovereignty with respect to the administration of their local concerns, but so that the central power is erected into a true state or nation, possessing sovereignty both external and internal, while the administration of national affairs is directed, and its effects felt, not by the separate states deliberating as units, but by the people of all, in their collective capacity, as citizens of the nation. The distinction is expressed, by the German writers, by the use of the two words "Staatenbund" and "Bundesstaat," the former denoting a league or confederation of

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states, and the latter a federal government, or a state formed by means of a league or confederation. It is to the latter class that the American Union belongs.[11]

A Representative Republic.

The United States is a federal republic. So also each of the states is a republic, and the constitution guaranties to each the continuance of republican government. The exact meaning of this phrase will be more fully considered in another place. At present it is sufficient to say that a republic, as distinguished from a despotism, a monarchy, an aristocracy, or an oligarchy, is a government wherein the political power is confided to and exercised by the people. It is a government "of the people, by the people, and for the people." It implies a practically unrestricted suffrage, and the frequent interposition of the people, by means of the suffrage, in the conduct of public affairs. The system of government in the United States and in the several states is distinguished from a pure democracy in this respect, that the will of the people is made manifest through representatives chosen by them to administer their affairs and make their laws, and who are intrusted with defined and limited powers in that regard, whereas the idea of a democracy, non-representative in character, implies that the laws are made by the entire people acting in a mass-meeting or at least by universal and direct vote.

THE UNION INDESTRUCTIBLE.

15. The United States is an indissoluble union of indestructible states. No state has the right to secede from it. The Union could be terminated only by the agreement of the people or by revolution.

There is, in this Union, no such thing as a right of secession, no right in any state to leave the Union and set up an independent government. The Union is permanent, and cannot be dissolved or disintegrated by the action of any state or states. This was settled forever by the political events of the last half century, by the

[11] 1 Wools. Pol. Science, pp. 166–170.

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concurrence of the people, and by the courts, the final interpreters of the constitution. In the important case of Texas v. White [12] we read as follows: "By the articles of confederation, the Union was declared to be perpetual. And when these articles were found to be inadequate to the exigencies of the country, the constitution was ordained 'to form a more perfect Union.' It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual union made more perfect is not?" Thus, when a state has once become a member of the Union, "there is no place for reconsideration or revocation, except through revolution, or through consent of the states." "But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government, by the states. Without the states in union there could be no such political body as the United States. Not only, therefore, can there be no loss of separate and independent autonomy to the states, through their union under the constitution, but it may not unreasonably be said that the preservation of the states and the maintenance of their governments are as much within the design and care of the constitution as the preservation of the Union and the maintenance of the national government. The constitution, in all its provisions, looks to an indestructible Union composed of indestructible states. When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union and all the guaranties of republican government in the Union attached at once to the state. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other states was as complete, as perpetual, and as indissoluble as the union between the original states. Considered, therefore, as transactions under the constitution, the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null."

[12] 7 Wall. 700. And see White v. Cannon, 6 Wall. 443.

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NATURE OF THE FEDERAL CONSTITUTION.

16. The constitution of the United States is not a compact, league, or treaty between the several states of the Union, but an organic, fundamental law, ordained and adopted by the people of the United States, establishing a national federal government.

Not a Compact or League.

The system of government existing under the articles of confederation was not a federal government, but a confederacy, in the sense of these terms as already explained. The articles constituted a league or treaty between the several states. They purported to have been adopted by delegates from the individual states, and to establish a "firm league of friendship" between those states. They were superseded by the constitution of the United States. This new government created a federal republic. It was not established by the states. It is not a league, treaty, convention, or compact between those states. It does not depend, either for its existence or its continuance, upon the consent of the states. The organic act, the constitution, was framed by delegates representing the several states in convention. But it was submitted to the consideration and acceptance of the people. The states did not act upon it. It was ratified and adopted by the people of the United States, who, acting for purposes of convenience within their respective states, appointed delegates for the sole purpose of deciding upon its adoption. Upon the ratification of the constitution, not merely the states, but also the people, became parties to the fundamental act. This is also shown by the language of the preamble, which declares that "We, the People of the United States, in order to form a more perfect Union, ... do ordain and establish this constitution for the United States of America." This doctrine is sanctioned by the decisions of the supreme court, the final interpreter of the constitution, from the very beginning of the government, by the course of the executive and legislative departments of the government in acting upon it and practically

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accepting it, and by the general consensus of opinion among the people, as shown by the events of our national history.[18]

An Organic Fundamental Law.

The United States being a sovereign and independent nation, the constitution is its organic and fundamental law. By this is meant that the constitution is the supreme act of legislation, ordained by the people themselves, by which the sovereignty, nationality, and organic unity of the nation is declared, the foundations of its government laid and established, and the organs for the execution of its sovereign will created. It is moreover a basic or fundamental law, which is supreme and unvarying, and to which all other laws, ordinances, and constitutions, by whomsoever adopted, must be referred as the criterion to determine their validity.

THE CONSTITUTION AS A GRANT OF POWERS.

17. The federal constitution contains a grant of powers to the government which it creates, but is not exhaustive of the powers which the people who maintain it might confer upon that government.

The constitution contains a grant of certain enumerated powers to the federal government or to one or other of its departments. All other powers of government are reserved to the several states or to the people. Historically, the United States, under its present government, is to be considered the successor of the confederation. And therefore the grant of powers to the United States by the constitution may be considered as an enlargement of, or addition to, the powers wielded by the central government under the articles of confederation. But it must not be forgotten that when the constitution was adopted there came into existence a nation (as distinguished from a league of states) which possessed absolute and unlimited inherent powers. The constitution should

[18] 1 Story, Const. §§ 306-372; Chisholm v. Georgia, 2 Dall. 419; Martin v. Hunter, 1 Wheat. 304; Cohens v. Virginia, 6 Wheat. 264; McCulloch v. Maryland, 4 Wheat. 316; Gibbons v. Ogden, 9 Wheat. 1; Rhode Island v. Massachusetts, 12 Pet. 657; Lane Co. v. Oregon, 7 Wall. 71; Texas v. White, 7 Wall. 700; U. S. v. Cruikshank, 92 U. S. 542.

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hence be considered as defining the powers and prerogatives which the sovereign people of the United States have deemed fit to confide to their federal government. The limits or scope of these powers might be either enlarged or restricted by further amendments to the constitution. But in the mean time, a certain measure of power has been intrusted to the national government, and the remainder is reserved, to be exercised by the several states, or to remain in abeyance until the people shall see fit to delegate it to one or the other government. But from this principle there follows an important difference, in regard to the test of validity, between federal action and state action. This will be more fully considered when we come to speak of the nature and boundaries of legislative power. At present, it is sufficient to remark that if the validity of federal action is questioned, the authority for it must be shown in the constitution. But if the question is as to the validity of state action, it is not the justification but the prohibition of it which must be pointed out. That is, state action is presumed to be well warranted until the objector has been able to point out the specific provision of either the federal constitution or the state constitution with which it is incompatible.

THE CONSTITUTION AS THE SUPREME LAW.

18. The constitution of the United States is the supreme law of the land, and is equally binding upon the federal government and the states and all their officers and people. Any and all enactments which may be found to be in conflict with the constitution are null and void.

The constitution itself declares that it shall be the supreme law of the land. This supremacy of the constitution means, first, that it must endure and be respected as the paramount law, at all times and under all circumstances, and in every one of its provisions, until it is amended in the mode which itself points out or is destroyed by revolution. Secondly, it means that all persons are bound to respect the constitution as the supreme law. It is not merely a limitation upon legislative power, but is equally binding upon all the departments and officers of government, both state and

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national. Thirdly, it means that no act of legislation which is contrary to its provisions is to be regarded or respected as law. A treaty which is in violation of the constitution would be null and void. So also would any act of congress which should be in excess of the legislative power granted to that body by the constitution, or in disregard of any of its prohibitions. If the people of a state amend their constitution or adopt a new constitution, it must conform to the federal constitution. If it does not, it is of no effect. And every act of the legislature of every state must equally obey the mandates of the supreme law, at the risk of being declared null. But this provision does not operate to make every clause of the federal constitution a part of the constitution of each state. It relates only to matters wherein the general government assumes to control the states, either by the exercise of exclusive jurisdiction or by direct prohibition of certain kinds of legislative action by the states.[14] Moreover, acts of congress passed in pursuance of the constitution are also the "supreme law of the land." Hence any act of congress which is valid and constitutional is supreme as against any law of a state which conflicts with it. When a state statute and a federal statute operate upon the same subject-matter, and prescribe different rules concerning it, and the federal statute is one within the competency of congress to enact, the state statute must give way; it is in effect no law, but an abortive attempt to exercise a power not possessed by the state legislature. Such is the effect when a conflict is found to arise between a state statute and the act of congress called the "interstate commerce law."[15] So also, when congress exercises its power to enact a bankruptcy law, that law becomes the supreme law of the land, and supersedes all state legislation dealing with the subject of insolvency. And again, the patent laws of the United States are supreme as against all state laws the enforcement of which would be inconsistent with the rights acquired under the federal legislation.[16]

[14] In re Rafferty, 1 Wash. St. 382, 25 Pac. 465.

[15] Gulf, C. & S. F. Ry. Co. v. Hefley, 158 U. S. 98, 15 Sup. Ct. 802.

[16] Columbia Wire Co. v. Freeman Wire Co., 71 Fed. 302.

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CHAPTER III.

ESTABLISHMENT AND AMENDMENT OF CONSTITUTIONS.

19. Government of the Colonies.
20. The Continental Congress and the Articles of Confederation.
21. Establishment of the Federal Constitution.
22-24. Amendment of the Federal Constitution.
25-27. Establishment of State Constitutions.
28-29. Amendment of State Constitutions.

GOVERNMENT OF THE COLONIES.

19. Previous to the War of Independence, the thirteen political communities which afterwards became the original states of the American Union were colonies of Great Britain. Three forms of government obtained in the colonies:

(a) Provincial.
(b) Proprietary.
(c) Charter.

The first form of government was that which prevailed in the provinces of New Hampshire, New York, New Jersey, Virginia, North Carolina, South Carolina, and Georgia. Under this system, a governor was appointed by royal commission, to act as the king's representative. He was invested with general executive power, a veto on local legislation, and the power to establish courts and appoint judges. He was assisted by a council, also nominated by the king, which acted as the upper house of the local legislature. The lower house consisted of a general assembly of representatives of the freeholders of the province.

In the proprietary governments the direct executive power had been granted out by the crown to individuals, who held them in the nature of feudatory principalities, with all the inferior royalties and subordinate powers of legislation which formerly belonged to the owners of counties palatine, but still subject to the sovereignty of the parent country. The proprietaries appointed the governors, and

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legislative assemblies were convened under their authority. This form of government existed, at the time of the revolution, in Maryland, Pennsylvania, and Delaware.

In three of the colonies, Massachusetts, Rhode Island, and Connecticut, the government was founded on charters granted by the crown, which secured to them a larger measure of liberty, and indeed invested them with general powers of local self-government, subject only to the suzerainty of Great Britain and to certain particular restrictions which will be presently noticed. In the first-mentioned colony, indeed, the governor was appointed by the king; but in the two others the governor, council, and assembly were annually chosen by the freemen, and all other officers were appointed by their authority.

In all the colonies the people claimed the right to enjoy all the liberties, privileges, and immunities of British subjects, including those safeguards against royal or governmental oppression which had been gradually evolved in the course of English history, and the benefit of the common law, in so far as the same was applicable to their needs and their situation. They also claimed that, for all purposes of domestic and internal regulation, their own legislatures possessed entire and exclusive authority. In all matters of this sort, it was strenuously denied that parliament possessed the power to legislate directly for the colonies. England's financial straits having forced her to attempt the levy and collection of taxes in the colonies, by act of parliament without the concurrence of the local legislatures, the power to tax the people without representation on their part was stoutly resisted and denied, and this was one of the causes which led to the revolt of the colonies. On the other hand, it was always provided that the laws passed by the colonial legislatures should not be repugnant to, but, as near as might be, agreeable to, the laws and statutes of England, and this sometimes gave occasion to the royal government to set aside or destroy acts of the local legislatures. Again, there could be no full measure of self-government when the legislative functions of the popular assemblies were participated in by a governor and council not chosen by the suffrages of the people. Moreover, the king and parliament never abandoned the claim that they had authority to bind the colonies by legislation in all cases whatsoever. Appeals lay to the king in council from the decisions

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of the highest courts of judicature in the colonies; and English statesmen contended that the royal prerogative was exercisable in his colonial dependencies in many more particulars than the colonists were willing to concede.[1]

THE CONTINENTAL CONGRESS AND THE ARTICLES OF CONFEDERATION.

20. The first positive step towards the Union was the formation of the Continental Congress, a revolutionary body, which inaugurated the war, declared the independence of the colonies, and drafted certain articles of confederation. Upon the ratification of these articles by the states, the United States of America came into being.

The Continental Congress.

The first national legislative assembly in the United States was the Continental Congress, which met in 1774, in pursuance of a recommendation made by Massachusetts and adopted by the other colonies. In this congress all the colonies were represented except Georgia. The delegates were in some cases chosen by the legislative assemblies in the states; in others, by the people directly. The powers of this congress were undefined. The recommendation which led to it contemplated nothing more than a deliberation upon the state of public affairs. But by the acquiescence of the states and their people, it proceeded to take measures and pass resolutions which concerned the general welfare and had regard to the inauguration and prosecution of the war for independence. The first Continental Congress was succeeded in the following year, according to its own proposal, by another body chosen and organized in the same manner, in which all the states were represented. This body provided for the raising and equipping of an army, intrusted the command in chief to General Washington, and framed, adopted, and promulgated the Declaration of Independence. The Continental Congress was not authorized by any pre-existing law or ordinance. Its acts and determinations were entirely outside the pale of ordinary law. It was not intended to be permanent, nor was it designed to be a national or

[1] See 1 Story, Const. §§ 159–197.

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confederate government. It was merely raised up, as an extraordinary institution, to meet the special exigencies of the situation of the colonies. It was regarded rather as an advisory body, wielding the war powers of the whole people, than as a government.[2]

The Articles of Confederation.

When it became apparent that a war had been entered on which must result either in the destruction of American liberties or in the introduction to the world of a new nation, it was evident to all those interested in the conduct of public affairs that the revolutionary congress was at once too weak and too indefinite a bond between the states. It was necessary to devise a scheme of association which would insure vigor and faithful co-operation in the conduct of hostilities and would also more clearly apportion the powers of government between the states and the congress. The congress, to this end, prepared a series of "Articles of Confederation and Perpetual Union," and submitted them to the states for their approval and ratification in 1777. Before the close of the following year the articles had been ratified by all the states except Delaware and Maryland. Of these, the former gave in its adherence in 1779, and the latter in 1781.

The articles of confederation provided that the style of the confederacy should be "The United States of America"; that "each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this confederation expressly delegated to the United States in congress assembled;" that "the said states hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other against all force offered to or attacks made upon them or any of them on account of religion, sovereignty, trade, or any other pretense whatever." The articles also provided for interstate rights of citizenship, the extradition of criminals, and the according of full faith and credit to the records and judicial proceedings of each state in all the others. They provided for an annual congress of delegates to be appointed in the several states, but re-

[2] On the Continental Congress, see 1 Story, Const. §§ 198–217; Pom. Const. Law, §§ 45–56; Rawle, Const. pp. 19–26; 1 Von Holst, Const. Hist. pp. 1–5.

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serving to each state the power to recall its delegates or any of them, at any time during the year, and to send others in their stead. Each state was required to "maintain" its own delegates. Each state was given one vote in "determining questions in the United States." Provision was made for freedom of speech and debate, and for the protection of members of the congress from arrest. The prohibitions laid upon the individual states were as follows: They could not send or receive embassies or make treaties, without the consent of congress, nor grant titles of nobility. They could not make treaties with each other, without the same consent. They could not lay imposts or duties which might interfere with treaties made by the United States. They could not, in time of peace, maintain armies or navies, except to such extent as congress should judge to be necessary for their defense. They could not engage in war, without the consent of congress, except in case of actual invasion or a threatened Indian depredation, nor commission ships of war, nor grant letters of marque or reprisal, unless after the United States had declared war, and then only against the other belligerent and under congressional regulation, "unless such state be infested by pirates." "All charges of war and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states, in proportion to the value of all land within each state granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in congress assembled shall from time to time direct and appoint. The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several states within the time agreed upon by the United States in congress assembled." The powers confided to "the United States in congress assembled" were principally as follows: To determine on peace and war; send and receive ambassadors; enter into treaties and alliances; establish rules for prizes and captures on land; to grant letters of marque and reprisal; establish courts for the trial of piracies and felonies committed on the high seas; to act as the last resort on appeal in all disputes and differences between the states on questions of boundary, jurisdiction, or other cause; to regulate the alloy and value of coin struck

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by their own authority or that of the respective states; to fix the standard of weights and measures; to regulate trade and manage affairs with the Indians; to establish and regulate post-offices from one state to another; to appoint superior officers of the army and navy, and make rules for the government and regulation of the land and naval forces, and direct their operations; to appoint a committee, to sit in the recess of congress, to be denominated a "committee of the states," and consisting of one delegate from each state; to appropriate and apply money for defraying the public expenses; to borrow money and emit bills on the credit of the United States; and to raise and maintain an army and navy. But in regard to nearly all these powers (and certainly all the most important of them), it was provided that they should never be exercised by the congress "unless nine states assent to the same."

Defects of the Articles of Confederation.

The articles of confederation were designed to bind the states together in a "firm league," but they proved to be no better than a rope of sand. Washington spoke of the confederation as "a shadow without the substance" and described congress as a "nugatory body." The Union, as thus constituted, was dependent on the states. There was a central government, but it was not intrusted with the means of its own preservation. It had no executive; it had no courts; it had no power to raise supplies. "Congress had hardly more than an advisory power at the best. It had no power to prevent or punish offenses against its own laws, or even to perform effectively the duties enjoined upon it by the articles of confederation. It alone could declare war, but it had no power to compel the enlistment, arming, or support of an army. It alone could fix the needed amount of revenue, but the taxes could only be collected by the states at their own pleasure. It alone could make treaties with foreign nations, but it had no power to prevent individual states from violating them. Even commerce, foreign and domestic, was to be regulated entirely by the states, and it was not long before state selfishness began to show itself in the regulation of duties on imports. In everything the states were to be sovereign, and their creature, the federal government, was to have only strength enough to bind the states into nominal unity, and only life enough to assure

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it of its own practical impotence."[3] Congress had the power to coin money, but had no bullion. It could emit bills of credit, but had no funds to redeem them. Even the expenses of its own members were to be defrayed by the states which sent them and which could recall them. In effect, all the powers granted to the general government by this constitution, if they were not self-executing, were entirely at the mercy of the individual states. It therefore became necessary to "form a more perfect Union" by establishing a constitution which should provide the central authority with adequate powers and adequate means for securing their enforcement.[4]

ESTABLISHMENT OF THE FEDERAL CONSTITUTION.

21. The constitution of the United States was framed by a constitutional convention called for the purpose of revising the articles of confederation. Being submitted to the people, it was duly ratified by them, acting within their respective states, and became the fundamental law of the nation.

The constitutional convention met in 1787, in pursuance of a resolution of congress, whereby it was recommended that a convention of delegates, who should be appointed by the several states, be held at Philadelphia, for the sole and express purpose of revising the articles of confederation, and reporting to congress and the several legislatures such alterations and provisions therein as should, when agreed to in congress and confirmed by the states, render the federal constitution adequate to the exigencies of government and the preservation of the Union. The convention was composed of delegates from all the states except Rhode Island. The resolution from which they derived their authority contemplated nothing more than a revision of the articles of confederation. But the convention was not long in determining that the whole scheme of government therein contained was so defective that it was beyond hope that the evils and inconveniences complained of by the people could be remedied

[3] Johns. Am. Pol. 7.

[4] On the articles of confederation, see 1 Story, Const. §§ 218–271; Pom. Const. Law, §§ 57–75; Rawle, Const. pp. 26–28; Federalist, Nos. 15–22.

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by any process of patching or mending the old constitution. In their judgment, what was needed was an entirely new frame of government. And this they proceeded to construct. Technically, they exceeded their authority, and hence, in a strict sense, their proceedings may be said to have been extra-legal, or even revolutionary. But they did not assume to impose the result of their labors upon the nation as a binding organic law, but offered it as a constitution to be discussed and to be ratified and confirmed before it should become operative. As a group of citizens, they had the unquestionable right to suggest a new constitution of government. And this was what in effect was done. The convention did not "report alterations and provisions" to be made in the articles of confederation. The authority granted to them was never exercised. But in lieu thereof, they submitted to congress and the people a new frame of government, which was eventually accepted and confirmed. The draft of the constitution was laid before congress and by them submitted to the several states. It contained a provision that as soon as it should have been ratified by nine of the states, it should become binding on those states. There ensued long, exhaustive, and acrimonious debates on the question of its adoption. But in the course of a year eleven of the states had ratified the constitution, and in September, 1788, congress made provision for the first election of federal officers and the inauguration of the national government under the new constitution. On the 30th of April, 1789, the first President of the United States took the oath of office, and the present government began the exercise of its functions as marked out in the constitution. The states of North Carolina and Rhode Island were not in the Union from the beginning. The former ratified the constitution in 1789, and the latter in 1790.[5]

AMENDMENT OF THE FEDERAL CONSTITUTION.

22. Amendments to the federal constitution may be proposed in two methods:

(a) By congress.

(b) By a convention called by congress for that purpose.

[5] See 1 Story, Const. §§ 272–279.

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23. Amendments proposed in either method must be ratified by three-fourths of the states; and this may be done in either of two ways, according as one or the other mode may be proposed by congress, viz.:

(a) By the legislatures of the states, acting as the representatives of the people.

(b) By conventions held in each state for the purpose.

24. Fifteen amendments to the federal constitution have thus far been adopted.

The fifth article of the constitution provides that "the congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress." Thus far, fifteen amendments have been made to the federal constitution. In every case the amendment has been proposed by congress and ratified by the states. No convention for revising the constitution, or proposing amendments to it, has ever been called. It should be noted that the article which contains the provision for amendments also enacts that no state, without its consent, shall be deprived of its equal suffrage in the senate. This is the one irrepealable clause of the constitution. And it is the provision which, more than all others, secures to each state its rightful independence and autonomy.

The First Ten Amendments.

The ratification of the constitution of the United States was procured from the states with great difficulty. Objections were proffered to almost every one of its provisions. This arose partly from local pride and jealousies, and partly from a strong distrust of the central government about to be erected. The several states, in yielding their assent, proposed and strongly urged the addition of such amendments as would guaranty, on the one hand, the protection of personal rights and liberties against federal oppression, and on the other hand, the retention by the states of such powers

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as were not specifically granted to the general government. It is said that no less than 201 of such amendments were suggested in the different state conventions. So urgent was the call for a more explicit settlement of these questions that congress, at its first session, prepared and submitted to the states a series of twelve amendments to the constitution. Ten of these were ratified by eleven of the states during the next two years, that is, before the close of 1791. And these now constitute the first ten amendments. Nine of them are intended as a bill of rights. They guaranty to individuals protection (as against federal action only) in respect to those rights and immunities which were considered to be inadequately provided for in the constitution itself.[6] The tenth establishes the principle that the government of the United States is one of delegated and limited powers, and that those powers which are not confided to it by the constitution, nor prohibited thereby to the states, are reserved to the states respectively or to the people.[7]

The Eleventh Amendment.

This amendment was adopted in consequence of the decision of the supreme court in Chisholm v. Georgia, 2 Dall. 419, that a state of the Union was liable to be sued, like a private person, by a citizen of another state or of a foreign country. "That decision created such a shock of surprise throughout the country that, at the first meeting of congress thereafter, the eleventh amendment to the constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the states. This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the supreme court. It did not in terms prohibit suits by individuals against the states, but declared that the constitution should not be construed to import any power to authorize the bringing of such suits." [8]

[6] The object of the first eight amendments to the federal constitution was to incorporate into it certain principles of natural justice which had become permanently fixed in the jurisprudence of the mother country, and therefore the construction given to those principles by the English courts is cogent evidence of what they were designed to secure, and of the limitations which should be put upon them. Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644.

[7] 1 Story, Const. § 803; 2 Story, Const. §§ 1857–1909.

[8] Per Bradley, J., in Hans v. Louisiana, 134 U. S. 1, 10 Sup. Ct. 504.

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The Twelfth Amendment.

This amendment, which introduces a change in the manner of electing the President and Vice-President, was adopted in consequence of the difficulties which attended the election of 1801. In that year, when the electoral votes were counted, it was found that Jefferson and Burr had each received 73, and consequently, as the constitution then stood, the election was cast upon the house of representatives, although it was notoriously the intention of the electors that Jefferson should be President and Burr Vice-President. Hence congress, in 1803, proposed the twelfth amendment, in lieu of the original third paragraph of the first section of the second article of the constitution, and it was duly ratified by the states. The amendment remedies the defect in the original provision of the constitution by providing for the casting of separate ballots for the two offices.

The Last Three Amendments.

The thirteenth, fourteenth, and fifteenth amendments were ratified by the requisite majority of the states in 1865, 1868, and 1870, respectively. They were rendered necessary by the events of the civil war, and the desire to prevent the possibility of any similar conflict in the future. They were designed to insure the utter and final abolition of slavery throughout the United States and all its dominions, and to secure to the newly emancipated race the same privileges of citizenship, and of personal and political rights, which were previously enjoyed by all others under the constitution. The legal effect of these amendments and of their specific provisions will be discussed in another place.

President's Approval of Amendments.

It has been made a question whether a proposed amendment is such an act of legislation as must be submitted to the President, before it goes to the state legislatures, for his approval, and whether he has the right to veto it. Executive and legislative precedent has settled this question in the negative, and considerations drawn from the wording of the constitution lead to the same result.[9] Nor is the question of great practical importance, because the concurrence of two-thirds of both houses of congress is required to the

[9] See Hollingsworth v. Virginia, 3 Dall. 378.

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proposing of amendments, and the same majority would be sufficient to overrule the President's veto, should one be interposed.

ESTABLISHMENT OF STATE CONSTITUTIONS.

25. All of the original states framed and adopted constitutions for themselves, eleven of them antedating the constitution of the United States.

26. Whenever a new state is admitted into the Union, its people have the right to ordain their own constitution, which, however, must conform to the federal constitution.

27. At the close of the late Civil War, the states which had been in rebellion were required to adopt new constitutions recognizing the supremacy of the Union and the validity of the new amendments.

Reconstruction.

At the end of the civil war, congress claimed and enforced the right to take measures for the restoration of those states which had passed secession ordinances to their normal and harmonious relations with the federal government. These acts were called the "reconstruction acts." By them, among other things, those states were required to adopt constitutions which should recognize the supremacy of federal law, the inviolability of the Union, the abolition of slavery, and such other provisions as are found in the last three amendments. This being done by those states, their senators and representatives were again admitted to their places in the national legislature, and the states themselves to all the rights and privileges of the Union. It should be noticed that this was altogether a different matter from the action which congress may take upon the admission of a new state into the Union. For these states were never out of the Union. And neither was it an attempt on the part of congress to make constitutions for those states. The constitutions were made and adopted by the people of the several states affected.[10]

[10] Texas v. White, 7 Wall. 700; In re Hughes, Phil. (N. C.) 57.

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AMENDMENT OF STATE CONSTITUTIONS.

28. A state constitution may be revised or amended by the people of the state, at their own pleasure, subject to the following limitations:

(a) The amendment or revision must be made in the mode pointed out by the constitution, if any, or directed by the legislature.

(b) It must be adopted by the vote of the qualified electors of the state.

(c) It must not be in any particular repugnant to or inconsistent with the constitution of the United States.

29. The work of revision of a state constitution is usually done by a constitutional convention, chosen in some lawful manner, which refers the result of its labors to the popular vote.

"All power is inherent in the people, and all free governments are founded on that authority, and instituted for their peace, safety, and happiness. For the advancement of these ends, they have at all times an unalterable and indefeasible right to alter, reform, or abolish the government, in such manner as they may think proper. These principles in this country are well-recognized political truths, independent of any written constitution or laws." [11]

Mode of Amendment.

Aside from the question of revolutionary action, a state constitution can be revised or amended only in the mode provided by the instrument itself, or as directed by an enactment of the legislature. If a volunteer convention (that is, one not authorized either by the constitution or an act of the legislature) should frame a revision or amendment of the constitution, its work would have no more force than the expression of so much private opinion. If it were submitted to a vote of the people, the election had upon it would be illegal. If it were ratified by a majority of the people,

[11] Ridley v. Sherbrook, 3 Cold. (Tenn.) 569.

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still it could gather no legality from their sanction. If then the attempt were made to set up the new constitution and dethrone the old, it could be done only by an act of force. And such an attempt, if successful, would be revolution, and if unsuccessful, treason.[12] If the constitution itself makes provision for the method of its amendment, that is the only legal method which can be adopted. If not, the legislature, acting in accordance with the wishes of its constituents, may direct the calling of a convention to prepare amendments to be submitted to the vote of the people. And it has been thought that this could be done by the legislature even when such a measure was in advance of, or supplementary to, the mode pointed out in the constitution.[13] But such is not the accepted doctrine. If the constitution merely declares that the legislature may prepare amendments and submit them to the people, there is no power in the legislature to provide for the calling of a convention to draft a new constitution and then submit it to the popular vote.[14]

Who Authorized.

When it is said that "the people" have the right to alter or amend the constitution, it must not be understood that this term necessarily includes all the inhabitants of the state. Since the question of the adoption or rejection of a proposed new constitution or constitutional amendment must be answered by a vote, the determination of it rests with those who, by the existing constitution, are accorded the right of suffrage. But the qualified electors must be understood in this, as in many other cases, as representing those who have not the right to participate in the ballot. If a constitution should be abro-

[12] Wells v. Bain, 75 Pa. St. 39; Koehler v. Hill, 60 Iowa, 543, 14 N. W. 738, 15 N. W. 609. "It has been contended that there is a great unwritten common law of the states, which existed before the constitution and which the constitution was powerless to modify or abolish, under which the people have the right, whenever invited by the general assembly, and, as some maintain, without any invitation, to alter and amend their constitutions. If there be any such law, for there is no record of it, or of any legislation or custom in this state recognizing it, then it is, in our opinion, rather a law, if law it can be called, of revolutionary than of constitutional change." In re Constitutional Convention, 14 R. I. 649.

[13] Wells v. Bain, 75 Pa. St. 39.

[14] In re Constitutional Convention, 14 R. I. 649.

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gated, and a new one adopted, by the whole mass of people in a state, acting through representatives not chosen by the "people" in the political sense of the term, but by the general body of the populace, the movement would be extra-legal.

Limits of Power.

What is the limit to the power of the people of a state in revising and amending their constitution? Supposing the amendment to be proposed and adopted in a lawful manner, there are no limitations upon the scope or character of the amendments except such as are to be found in the constitution of the United States. But these are important. The people of a state could not, by means of such amendment, establish any form of government that was not in accordance with the theory and system of a republic, for the continuance of republican government in all the states is guarantied by the federal constitution. They could not deny allegiance to the United States, nor deny that the federal constitution and laws and treaties are the supreme law of the land. Nor could they exempt their legislative, executive, and judicial officers from taking an oath or affirmation to support the constitution of the United States. Neither could they divide the state into two or more states, thus bringing a new state or states into the Union, or unite with another state, to form one new state, without the consent of congress. Nor could they adopt any provision which would impair the obligation of contracts or pass any bill of attainder or ex post facto law, or grant titles of nobility. Nor could they deny full faith and credit to the public acts, records, and judicial proceedings of the other states; nor so regulate the rights of their own citizens as to deny their privileges and immunities to citizens of the other states, or abridge the privileges and immunities of citizens of the United States. Neither could they, by enactments in the form of a constitution or of amendments thereto, deprive any person of life, liberty, or property without due process of law, or deny to any person within their jurisdiction the equal protection of the laws. Nor could they thus establish or permit slavery, or deny or abridge the right of citizens of the United States to vote, on account of race, color, or previous condition of servitude. Nor could the state thus assume any of the powers exclusively vested in congress.

But so far as regards the functions and powers of government,

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and their distribution and separation, the institutions of the state, the regulation of personal, social, and political rights, even those heretofore deemed most fundamental and necessary to the maintenance of freedom, in so far as the same are not created or secured by the federal constitution, the power of the people, in making or amending their constitution, is plenary and supreme.[15]

Governor's Approval of Amendment.

The amendment itself need not be submitted to the governor for his approval or veto. But the proposition, or resolution, of the legislature to refer the amendment to the popular vote may take such a shape as to fall within the designation of ordinary legislation, and so require the assent of the executive. The practice in the different states, in this particular, is not uniform.[16]

Powers of Constitutional Convention.

If the convention is called for the purpose of amending the constition in a specified part, the delegates have no power to act upon and propose amendments in other parts of the constitution.[17] The convention cannot take from the people their sovereign right to ratify or reject the constitution or ordinance framed by it, and cannot infuse life and vigor into its work before ratification by the people.[18] But the people, in conferring authority upon the convention, may intrust it with power not merely to prepare a draft of a new constitution, but to "enact" it, and when such authority is given, the new instrument need not be submitted to the popular ratification.[19] A constitutional amendment does not become operative upon the casting in its favor of the necessary majority of votes, but

[15] In re Gibson, 21 N. Y. 9.

[16] See In re Senate File 31, 25 Neb. 864, 41 N. W. 981; State v. Secretary of State, 43 La. Ann. 590, 9 South. 776.

[17] Opinion of the Justices, 6 Cush. (Mass.) 573. And when a convention is called to frame a constitution, which is to be submitted to a popular vote for adoption, it cannot pass ordinances, and give them validity, without submitting them to the people for ratification as a part of the constitution. Quinlan v. Railway Co. (Tex. Sup.) 34 S. W. 738.

[18] Woods' Appeal, 75 Pa. St. 59; State v. Mayor, etc., of City of New Orleans, 29 La. Ann. 863.

[19] Sproule v. Fredericks, 69 Miss. 898, 11 South. 472.

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only after the due promulgation of the result.[20] A clause in the bill of rights, in a state constitution, may be amended in the same manner as any other part of the constitution.[21]

Effect of Amendment.

An amendment to a constitution is not to be considered as if it had been in the original instrument, but rather as analogous to a codicil or a second deed, altering or rescinding the first, which is referred to only to see how far the first must yield to give full effect to the last. The legal fiction regarding an amendment to a pleading as if inserted in the first instance, does not apply.[22]

[20] Sewell v. State, 15 Tex. App. 56; State v. Mayor of Morgan City, 32 La. Ann. 81; People v. Norton, 59 Barb. 169.

[21] State v. Cox, 8 Ark. 436.

[22] University v. McIver, 72 N. C. 76, per Pearson, C. J.

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CHAPTER IV.

CONSTRUCTION AND INTERPRETATION OF CONSTITUTIONS.

30. Office and Duty of the Judiciary.
31. Adjudging Unconstitutionality.
32. The Court.
33. Full Bench.
34. Nature of the Litigation.
35. Parties Interested.
36. Necessity of Decision.
37. Construction.
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39. Presumption of Legality.
40. Reference to Journals of Legislature.
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42. Policy of Legislation.
43. Natural Justice.
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45. Preamble.
46. Effect of Decision.
47. Construction of Constitutions—Method.
48–49. Intent to be Sought.

OFFICE AND DUTY OF THE JUDICIARY.

30. The judicial department of the government is the final and authoritative interpreter of the constitution.

There is a sense in which every person, even a private individual, must judge of the meaning and effect of the constitution, in order to govern his own actions and his dealings with other men. And the executive and legislative departments of government are clearly under the necessity of making similar determinations, at least in advance of authoritative expositions by the courts. But as the constitution is a law, and questions concerning its scope and interpretation, and of the conformity of public and private acts to its behests, are questions of law, the ultimate determination of such questions must belong to the department which is charged with the function of ascertaining and applying the law. And as the courts have the power to enforce their judgments, their determination of such ques-

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tions is final. And as their decisions are entitled to respect and obedience as precedents, their expositions of the constitution are authoritative.

ADJUDGING UNCONSTITUTIONALITY.

31. It is the right and duty of the courts to examine the constitutional validity of every statute brought fairly before them as applicable to a pending controversy; and if they find such statute to be in contravention of the constitution, they may and must pronounce it a nullity and no law.[1]

It is the business of the judicial department of government to interpret and apply the law to cases brought before them. In so doing, they must determine what is the law applicable to a particular case. A statute which, if valid, will govern the case, is presumptively the law for its decision. But a statute is the expressed will of the legislature, while the constitution is the expressed will of the people. The latter is paramount. If the statute conflicts with it, it is invalid; it is no law. Now when this question of unconstitutional legislative action is raised, in such a manner as to become necessary to the determination of the pending cause, the court must decide it; and if it shall find that the statute is in violation of the constitution, and therefore no law, it must so declare, and decide the case accordingly. This is the whole rationale of the power of the courts to adjudge statutes invalid. It is not a veto power. It is not a supervisory power over legislation. It is simply the power to ascertain and decide what is the law for the determination of the cause which happens to be before the court.[2]

An American Institution.

This power of the judiciary to judge of the constitutional validity of acts of legislation is an invention of the American people and an institution peculiar to our country. It is not one of the political ideas borrowed from the British constitution. No such power belongs to the English judges. It is true there are some cases in their reports, prior to the revolution, in which the judges would appear

[1] Vanhorne's Lessee v. Dorrance, 2 Dall. 304.
[2] Griffin's Ex'r v. Cunningham, 20 Grat. (Va.) 31.

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to have asserted a right to decide upon the validity of acts of parliament, and to adjudge them void if they violated the great principles of liberty or of natural justice. Thus in Bonham's Case,[3] Lord Coke is reported to have said: "It appeareth in our books that in many cases the common law will control acts of parliament and adjudge them to be utterly void; for where an act of parliament is against common right and reason or repugnant or impossible to be performed, the common law will control it and adjudge it to be void." But a careful examination of the authorities will show that these statements mean no more than that the judges would not so construe an act of parliament as to give it an unjust, unreasonable, or oppressive operation, if they could avoid it, and that, to escape such consequences, they would resort even to a forced and unnatural construction, assuming that parliament could not have intended such a result. But it was clearly settled in England, at the time of the American revolution, that if it was the positive will of parliament to enact an unjust or unreasonable law, and if that will was too clearly expressed to admit of its being construed away, then the judges were bound to obey it, and there was no power which could control it, unless it were by a revolution.[4] Neither is there at the present day any court on the continent of Europe which possesses the power and authority to pronounce against the validity of an act of the national legislature on account of its conflict with the written constitution of the state.[5] So that the position of the American

[3] 8 Coke, 118a. And see, also, Day v. Savadge, Hob. 87; City of London v. Wood, 12 Mod. 687.

[4] 1 Bl. Comm. 91; 1 Kent, Comm. 447. Winthrop v. Lechmere, Thayer, Cas. Const. Law, 34, was a case (in 1727) in which the privy council adjudged an act of the colony of Connecticut to be null and void, because in conflict with the royal charter of the colony, in that it was contrary to the laws of England. But this can hardly be considered as a precedent for the American doctrine, on account of the limited nature of the legislative authority of the colony and its dependent position.

[5] Professor Thayer, in his valuable collection of cases on constitutional law (pp. 146–149), quoting from Ceze on Judicial Power, mentions a case of Garbade v. State of Bremen, in the Hanseatic court of upper appeal, in 1875, in which judgment was given against the validity of a law of Bremen, because it was in contravention of the constitution of that state. It is stated that the court was much influenced in this case by the writings of the jurist Von Mohl, who, in turn, based many of his views on the works of Story, Kent,

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courts, in this regard, is virtually unique. It is not to be supposed, however, that this power of our courts was created by the constitution of the United States. It may be justified by that instrument. But there are several well-authenticated instances in which the courts of the states declared against the validity of acts of their legislatures, on account of repugnance to their constitutions, before the federal constitution was adopted. Therefore if we regard the power as expressly given by the federal constitution to the federal courts, it was not an invention of the framers of that constitution, but was in line with precedents already furnished by the states. And if we are to consider that the federal courts claimed the power as an implication from their constitution and office, they had authority for the claim in the previous action of the state courts.[6] The first case

and the Federalist. But this decision was expressly overruled, in 1883, by the imperial tribunal (or supreme court) of the German Empire, in the case of K. v. Dyke Board of Niedervieland, in which the power of the judiciary to pass upon the constitutional validity of statutes was categorically denied. See, also, Krieger v. State of Bremen, in Thayer, ubi supra. It appears that the federal court of Switzerland may in some cases pronounce against the validity of a cantonal law. Bryce, Am. Com. vol. 1, p. 430, note. And the supreme court of Hawaii may adjudge statutes unconstitutional. King v. Young Tang, 7 Hawaii, 49. These are the only known exceptions to the general rule, and in both these cases the idea was evidently borrowed from the American system.

[6] Among these early cases, particular attention should be directed to the following: Bayard v. Singleton, 1 Mart. (N. C.) 42; Rutgers v. Waddington, Thayer, Cas. Const. Law, 63; Com. v. Caton, 4 Call, 5; Bowman v. Middleton, 1 Bay, 252; Byrne v. Stewart, 3 Desaus. Eq. 466; Com. v. Smith, 4 Bin. 117; Trevett v. Weeden, Thayer, Cas. Const. Law, 73. In the last-named case, in 1786, the superior court of judicature of Rhode Island decided against the constitutionality of an act of assembly which authorized summary convictions in certain cases without a trial by jury. The indignation of the legislature was aroused, and they summoned the judges to appear before them, "to render their reasons for adjudging an act of the general assembly unconstitutional and so void." The judges accordingly appeared, and defended themselves with dignity, but with much vigor and learning. It was then voted by the legislature that they were not satisfied with the reasons given by the judges, and a motion was made to dismiss the judges from their office. But it was shown that this could not be done except by impeachment "or other regular process;" and it was finally resolved that the judges be discharged from any further attendance upon the assembly, on the ground that they were not charged with any "criminality" in rendering the judg-

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in which the supreme court of the United States adjudged an act of congress to be unconstitutional and void was Marbury v. Madison,[1] in which the decision was against that portion of the judiciary act which gave to the supreme court authority to issue writs of mandamus to public officers. This power has not always been claimed by the courts. There are some instances in which they have distinctly repudiated it.[2] But it is now fully and irrevocably settled, not only that the power belongs to the judicial tribunals, but that they are bound to exercise it in all proper cases.

SAME—THE COURT.

32. All courts have the right to judge of the constitutionality of a statute. But there are certain cases in which the decision of one court, on such a question, is binding on other courts.

Considerations relating to the relative rank of different courts, and the effect of precedents, have given rise to the following rules:

1. Inferior courts, whether of the state or federal system, should not undertake to adjudge against the validity of a statute, except

ment they had given. No impeachment proceedings were had, but we are told that in the succeeding year the legislature elected a new bench of judges, who were more compliant to their will.

[1] 1 Cranch, 137. Marshall, C. J., in delivering the opinion, vindicated the right and duty of the judiciary with great clearness and ability. Cooper v. Telfair, 4 Dall. 14, was an earlier case, but there, while the court inclined to the opinion that an act in plain violation of the constitution might be adjudged invalid, they refused to so rule in regard to a bill of attainder passed by the legislature of Georgia in 1782, on the ground that there was at that time no specific provision of the constitution which forbade such acts, and that they must be considered as within the general scope of legislative power unless prohibited.

[2] Thus, in Eakin v. Raub, 12 Serg. & R. 330, Judge Gibson, of Pennsylvania, expressed the opinion that the judiciary had no right or power to pronounce an act of the legislature void for conflict with the constitution of the state, although they were not bound to give effect to acts which were in violation of the constitution of the United States. But twenty years later, in Norris v. Clymer, 2 Pa. St. 281, this judge admitted that he had changed his opinion on this point, partly "from experience of the necessity of the case."

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in cases where its unconstitutionality is plain and unmistakable.[9] This rule is based, not only upon the respect which is due to the legislative body, but also upon the consideration that the judgments of these courts are subject to review in the higher tribunals, where any erroneous determinations may be corrected. Yet it is the right, and may become the duty, of an inferior court, in proper cases, to pass upon the validity of acts of legislation. Thus, a county court of a state may adjudge an act of the state legislature to be void for repugnance to the federal constitution; for the judge of that court is bound by his oath to support that constitution as the supreme law of the land.[10]

2. If the court of last resort in a state has pronounced in favor of or against the constitutionality of a state statute, its decision is binding on all the inferior courts of the state, and the question is no longer an open one for such courts.[11]

3. If the question of the validity of a statute of one state comes legitimately before the courts of another state, such courts are at liberty to determine the question for themselves. But in so doing, they will pay great respect to the opinions of the courts of the state which enacted the statute, if the question concerns its conformity to the constitution of that state. If the question arises from an alleged repugnance to the federal constitution or an act of congress, the court trying the case will be bound by a decision of the United States supreme court, if any there be, on the same question, otherwise it will be at liberty to exercise its own judgment.[12]

4. The judgment of the highest court of a state, that a statute has been enacted in accordance with the requirements of the state constitution, is conclusive upon all the courts of the United States and will not be reviewed by them. But if the ground of invalidity urged against the statute is that it contravenes the federal constitution or an act of congress, the federal courts will not be bound by the decisions of the state courts.[13]

[9] Sarony v. Lithographic Co., 17 Fed. 591; White v. Kendrick, 1 Brev. (S. C.) 409.

[10] Lent v. Tillson, 140 U. S. 316, 11 Sup. Ct. 825.

[11] Palmer v. Lawrence, 5 N. Y. 389; Wheeler v. Rice, 4 Brewst. (Pa.) 129.

[12] Stoddart v. Smith, 5 Bin. (Pa.) 355.

[13] Atlantic & G. R. Co. v. Georgia, 98 U. S. 359.

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5. The validity of an act of congress may be passed upon by the state courts, until it has been settled by the supreme court of the United States; after that, the question is no longer open.

6. A decision of the supreme federal court, for or against the validity of an act of congress, or for or against the validity of a state law in respect to its conformity to the federal constitution or federal laws, is binding and conclusive, until overruled, on all courts of every grade, both state and national.

SAME—FULL BENCH.

33. It is a rule adopted by many appellate courts, though not all, that they will not decide the question of the constitutionality of a statute until a hearing has been had before the full bench of judges, in order that all the members of the court may participate in the decision.

The reasons for this rule are two: In the first place it is possible that a judgment pronounced by less than a majority of the whole court might be overruled by the full court when the question again arises; and all courts are disposed to avoid events which so seriously unsettle the law. Secondly, the courts are inclined to defer the decision of such questions until a full bench can be had on account of the great importance of the question involved and on account of a delicacy in the matter of setting aside a legislative act unless their full number has considered it. But this rule is not imposed upon the courts by any constitutional provision or statute. And it is sometimes impossible to apply it. For instance, the decision in the very important case known as the "Chicago Lake Front Case" [14] was rendered by four judges out of the nine who compose the supreme court. But that was because two of the judges, on account of interest, took no part in the decision of the case, and three dissented.

[14] Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 13 Sup. Ct. 110.

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SAME—NATURE OF THE LITIGATION.

34. To induce the courts to pass upon the constitutionality of a statute, the question must arise in the course of an actual and bona fide litigation.

The judicial tribunals will decline to exercise this high office unless it becomes necessary in order to determine the rights of parties in a real and antagonistic controversy. "It never was thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act." [15]

SAME—PARTIES INTERESTED.

35. A statute will not be declared unconstitutional on the application of a mere volunteer or person whose rights it does not specially affect.

"It is a rule, and a very wholesome rule, that no one can take advantage of the unconstitutionality of an act who has no interest in and is not affected by it." [16] For instance, the objection that a state statute impairs the obligation of contracts cannot be urged against it in a proceeding to which the only parties who have any contract rights to be affected by it, if any such exist, have not been made parties. It is only when some person attempts to resist the operation of an act claimed by him to impair the obligation of a contract, and calls in the aid of the judicial power to pronounce it void as to him, his property, or his rights, that the objection of unconstitutionality can be presented and sustained.[17] So, again, white persons will not be heard to object that an act under which a tax has been levied is unconstitutional because the property of colored persons is made subject to the tax, while they are neither allowed

[15] Chicago & G. T. Ry. Co. v. Wellman, 143 U. S. 339, 12 Sup. Ct. 400.

[16] State v. Snow, 3 R. I. 64; Wellington, Petitioner, 16 Pick. (Mass.) 96; State v. Becker, 3 S. D. 29, 51 N. W. 1018.

[17] People v. Brooklyn, F. & C. I. Ry. Co., 89 N. Y. 75; Moore v. City of New Orleans, 32 La. Ann. 726.

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to vote on the question of taxation nor to participate in the benefits for which the tax is levied.[18] Persons may also become estopped from denying the constitutionality of a statute, by participating in the procurement of its passage, by acquiescing in it after its passage, or by accepting benefits under it, although it may be invalid as to all other persons.[19] And an individual has no right to complain that a law is unconstitutional after he has endeavored to take the benefit of it to the injury of others.[20] But taxpayers, citizens of the state, may maintain a bill quia timet to restrain the executive officers of the state from funding the public debt under an act which is unconstitutional and void.[21]

SAME—NECESSITY OF DECISION.

36. The question of constitutionality will not be decided unless it is imperatively necessary to the right disposition of the case.

Courts are not eager to annul acts of the legislature. A becoming respect for a co-ordinate branch of the government will make them loath to adjudicate the grave question of the constitutional validity of a statute, and they will not do so when the matters or questions presented by the record do not require it.[22] The decision of a case will be rested on grounds which do not involve a determination as to the validity of the statute, if there be any such in the case. It is only when the question of the power of the legislature under the limitations of the constitution is the very gist and marrow of the case that the courts will give their judgment on this point. And if a judgment on the question of constitutionality was not necessary to the determination of the particular case, it will usually be regarded as obiter dictum and not as concluding the question. As a corollary to the foregoing rule, it may be stated that the courts will ordinarily refuse to decide upon the constitutionality of

[18] Norman v. Boaz, 85 Ky. 557, 4 S. W. 316.
[19] Ferguson v. Landram, 5 Bush (Ky.) 230.
[20] Hansford v. Barbour, 3 A. K. Marsh. (Ky.) 515.
[21] Lynn v. Polk, 8 Lea (Tenn.) 121.
[22] Weimer v. Bunbury, 30 Mich. 201; Hopson v. Murphy, 1 Tex. 314.

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a statute except when the decision is necessary to the final disposition of the case. That is, they will not allow the question to be raised, or will not determine it, upon preliminary, provisional, or collateral proceedings, such as motions for a preliminary injunction, motions to strike out pleadings, hearings concerning costs, or the like.[23]

SAME—CONSTRUCTION.

37. Unconstitutionality will be avoided, if possible, by putting such a construction on the statute as will make it conform to the constitution.

The courts will not so construe the law as to make it conflict with the constitution, but will rather put such an interpretation upon it as will avoid conflict with the constitution and give it the force of law, if this can be done without extravagance. They may disregard the natural and usual import of the words used, if it is possible to adopt another construction, sustaining the statute, which shall not be strained or fantastic. In so doing, they construe the act in accordance with the presumed intention of the legislature. For the law-making body is always presumed to have acted within the scope of its powers.[24]

SAME—EXECUTIVE CONSTRUCTION.

38. Courts will be influenced, but not bound, by a long and uniform construction of a statute, with respect to its constitutionality, by the other branches of the government.

While the courts are to determine for themselves all questions of constitutionality which come properly before them, yet it is proper and usual for them to show much respect to the decisions of the executive and legislative departments, made for their own guidance, upon the same questions, especially when such decisions have been acquiesced in and acted upon for a long period of time.[25]

[23] Deering v. Railroad Co., 31 Me. 172; Lothrop v. Stedman, 42 Conn. 583.

[24] Inkster v. Carver, 16 Mich. 484; Newland v. Marsh, 19 Ill. 376; Roosevelt v. Godard, 52 Barb. 533; Parsons v. Bedford, 3 Pet. 433; Grenada Co. v. Brogden, 112 U. S. 261, 5 Sup. Ct. 125.

[25] Stuart v. Laird, 1 Cranch, 299.

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SAME—PRESUMPTION OF LEGALITY.

39. Every presumption is in favor of the constitutionality of an act of the legislature.

Legislators, as well as judges, are bound to obey and support the constitution, and it is to be understood that they have weighed the constitutional validity of every act they pass. Hence the presumption is always in favor of the constitutionality of a statute; every reasonable doubt must be resolved in favor of the statute, not against it; and the courts will not adjudge it invalid unless its violation of the constitution is, in their judgment, clear, complete, and unmistakable.[26]

SAME—REFERENCE TO JOURNALS OF LEGISLATURE.

40. The journals of the legislature may be resorted to for the purpose of determining whether the act was passed in due form; but no evidence will be received to contradict the journals.

A statute may be unconstitutional for lack of compliance with the forms prescribed by the constitution in the process of its enactment. If it is shown to the court that the legislature has neglected or violated its duty in any of these particulars, the act must be pronounced invalid. And for this purpose, the court may go behind the enrolled or printed bill and examine the journals of the two houses. But the act will not be adjudged void unless the journals affirmatively show a lack of compliance with such forms.[27]

[26] Tonnage Tax Cases, 62 Pa. St. 286; Kerrigan v. Force, 68 N. Y. 381; Hartford Bridge Co. v. Union Ferry Co., 29 Conn. 210; Flint River Steamboat Co. v. Foster, 5 Ga. 194; Mayor, etc., of Baltimore v. State, 15 Md. 376; Stewart v. Supervisors of Polk Co., 30 Iowa, 9.

[27] Prescott v. Illinois Canal, 19 Ill. 324; Common Council of Detroit v. Board of Assessors, 91 Mich. 78, 51 N. W. 787. Compare Kilgore v. Magee, 85 Pa. St. 401. And see infra, p. 296.

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SAME—MOTIVES OF LEGISLATURE.

41. The motives of the legislature, in passing a particular measure, cannot be inquired into, nor can it be shown that it was procured by fraud or bribery.

The constitutionality of a statute is a bare question of legislative power, and any inquiry as to the motives operating on the minds of the legislators, in voting for the measure, is entirely incompetent. The validity of a statute does not in the least depend on the considerations which induced the legislature to enact it. Evidence to establish fraud, bribery, or corruption against the members of the legislature, as a ground for setting aside the statute, is not admissible. The courts are not made guardians of the morals of the legislators, nor are they at liberty to impute to them any improper motives.[28] Nor can it be shown that deception or suppression of the truth was practiced upon the legislature to induce the passage of the act. Thus, an inquiry as to whether a land grant was obtained by a railroad company by false representations to the legislature would indirectly interfere with the power of the legislature to enact such laws as it may deem best for the general good. The courts will therefore presume (whatever may be averred to the contrary) that no general statute is ever passed either for want of information upon the part of the legislature or because it was misled by the false representations of interested parties.[29]

SAME—POLICY OF LEGISLATION.

42. A statute cannot be declared void on considerations going merely to its policy or propriety.

The courts have nothing whatever to do with the policy, expediency, wisdom, or propriety of acts of the legislature. Such matters

[28] Fletcher v. Peck, 6 Cranch, 87; Ex parte Newman, 9 Cal. 502; State v. Fagan, 22 La. Ann. 545; Williams v. Nashville, 89 Tenn. 487, 15 S. W. 364; Parker v. State, 132 Ind. 419, 31 N. E. 1114; Lynn v. Polk, 8 Lea (Tenn.) 121; Jewell v. Weed, 18 Minn. 272 (Gil. 247).

[29] Farmers' Loan & Trust Co. v. Chicago, P. & S. Ry. Co., 39 Fed. 148. And see Stevenson v. Colgan, 91 Cal. 651, 27 Pac. 1089.

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are questions for legislative determination, but do not belong to the judiciary. Consequently, if a given statute does not violate any provision of the constitution, and is within the general scope of legislative power, the courts cannot adjudge it void merely because it appears to them to be impolitic, unjust, improper, absurd, or unreasonable. To do so would not be an exercise of the judicial functions, but an usurpation of legislative powers.[30]

SAME—NATURAL JUSTICE.

43. A statute cannot be declared invalid because it is opposed to the principles of natural justice or the supposed spirit of the constitution.

It has sometimes been held that if a statute, in the judgment of the court, was contrary to the principles of natural justice, or the general spirit of the constitution, or the maxims of republican government, or the principles of right and liberty supposed to lie at the base of all institutions in a free country, it was the duty of the court to pronounce it invalid.[31] But the prevailing opinion at the present day is that there is no such power in the courts. The legislature of a state possesses the power to pass any and every law, on any and every subject, which does not amount to an encroachment upon the province of either of the other departments and is not in conflict with the express terms of either the federal or state constitution. Consequently, one who objects to the validity of an act of the legislature must be able to point out the specific prohibition, requirement, or guaranty which it violates. If this cannot be done, the act is valid. Natural justice, the principles of republican government, and

[30] Angle v. Railway Co., 151 U. S. 1, 14 Sup. Ct. 240; Merchants' Union Barb Wire Co. v. Brown, 64 Iowa, 275, 20 N. W. 434; People v. Common Council of Rochester, 50 N. Y. 525; Sears v. Cottrell, 5 Mich. 251; People v. Draper, 15 N. Y. 532.

[31] Citizens' Sav. & Loan Ass'n v. Topeka, 20 Wall. 655. And see Ham v. McClaws, 1 Bay (S. C.) 93, 98; People v. Board of Salem, 20 Mich. 452. In Welch v. Wadsworth, 30 Conn. 149, it was said: "The power of the legislature is not unlimited. They cannot entirely disregard the fundamental principles of the social compact. Those principles underlie all legislation, irrespective of constitutional restraints, and if the act in question is a clear violation of them, it is our duty to hold it abortive and void."

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the equal rights of men, are supposed to be adequately guarantied, in this country, by the express provisions of the constitutions. If they are not, the constitutions are at fault. But that is no limitation upon the legislative power. And the spirit of the constitution cannot be appealed to except as it is manifested in the letter.[82]

"We are urged," said a learned judge in a case in Pennsylvania, "to hold that a law, though not prohibited, is void if it violates the spirit of our institutions, or impairs any of those rights which it is the object of a free government to protect, and to declare it unconstitutional if it be wrong and unjust. But we cannot do this. It would be assuming a right to change the constitution, to supply what we might conceive to be its defects, to fill up every casus omissus, and to interpolate into it whatever in our opinion ought to have been put there by its framers. The constitution has given us a list of the things which the legislature may not do. If we extend that list, we alter the instrument, we become ourselves the aggressors, and violate both the letter and spirit of the organic law as grossly as the legislature possibly could. If we can add to the reserved rights of the people, we can take them away; if we can mend, we can mar; if we can remove the landmarks which we find established, we can obliterate them; if we can change the constitution in any particular, there is nothing but our own will to prevent us from demolishing it entirely." [83]

SAME—PARTIAL UNCONSTITUTIONALITY.

44. Where part of a statute is unconstitutional, but the remainder is valid, the parts will be separated, if possible, and that which is constitutional will be sustained.

It frequently happens that some parts, features, or provisions of a statute are invalid, by reason of repugnancy to the constitu-

[82] Reeves v. Corning, 51 Fed. 774; Forsythe v. City of Hammond, 68 Fed. 774; People v. Draper, 15 N. Y. 532; Bertholf v. O'Reilly, 74 N. Y. 509; State v. Wheeler, 25 Conn. 290; Praigg v. Supply Co. (Ind. Sup.) 42 N. E. 750; People v. Richmond, 16 Colo. 274, 26 Pac. 929; Sawyer v. Dooley, 21 Nev. 390, 32 Pac. 427.

[83] Sharpless v. Mayor, etc., 21 Pa. St. 147.

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tion, while the remainder of the act is not open to the same objection. In such cases it is the duty of the court not to pronounce the whole statute unconstitutional, if that can be avoided, but, rejecting the invalid portions, to give effect and operation to the valid portions. The rule is, that if the invalid portions can be separated from the rest, and if, after their excision, there remains a complete, intelligible, and valid statute, capable of being executed, and conforming to the general purpose and intent of the legislature, as shown in the act, it will not be adjudged unconstitutional in toto, but sustained to that extent.[34] "The constitutional and the unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand, though the last fall."[35] But "when the parts of a statute are so mutually connected and dependent, as conditions, considerations, or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, if some parts are unconstitutional and void, all the provisions which are thus dependent, conditional, or connected must fall with them."[36] But if the purpose of the statute "is to accomplish a single object only, and some of its provisions are void, the whole must fall, unless sufficient remains to effect the object without the aid of the invalid portion."[37] And if the unconstitutional clause cannot be rejected without causing the statute to enact what the legislature never intended, the whole statute must be adjudged invalid.[38]

[34] Presser v. Illinois, 116 U. S. 252, 6 Sup. Ct. 580; Mobile & O. R. Co. v. State, 29 Ala. 573; State v. Exnicios, 33 La. Ann. 256; People v. Kenney, 96 N. Y. 294.

[35] Com. v. Hitchings, 5 Gray (Mass.) 482.

[36] Warren v. Mayor, etc., 2 Gray (Mass.) 84; Slauson v. City of Racine, 13 Wis. 398; W. U. Tel. Co. v. State, 62 Tex. 630; Eckhart v. State, 5 W. Va. 515.

[37] People v. Cooper, 83 Ill. 585.

[38] Spraigue v. Thompson, 118 U. S. 90, 6 Sup. Ct. 988.

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SAME—PREAMBLE.

45. A statute will not be declared unconstitutional on account of a statement of the reasons for enacting it, or anything else, found in the preamble, when the objection does not appear in the body of the act.[39]

The preamble to a statute is an introductory clause which sets forth the reasons which have led to the enactment, by reciting the state of affairs intended to be changed, the evils designed to be remedied, the advantages sought to be procured or promoted by the new law, or the doubts as to the prior state of the law which it is meant to remove. It is thus an exposition of the motives of the legislature, and in some sense a key to the meaning of the terms which they have employed to express their avowed intention. But it is not an essential part of the statute, and is by no means found universally in modern laws. Hence if the body of the act is free from constitutional objections, it will not be adjudged invalid by reason of anything found in the preamble.

SAME—EFFECT OF DECISION.

46. A decision against the constitutionality of a statute, rendered by a competent court in a proper case, makes the statute entirely null and inoperative so long as the decision stands.

"An unconstitutional act is not a law. It confers no rights; it imposes no duties; it affords no protection; it creates no office. It is, in legal contemplation, as inoperative as though it had never been passed."[40] And if the statute is adjudged unconstitutional in part, that part which is rejected will be a nullity. But in view of the fact that courts sometimes overrule their decisions on constitutional questions, it is necessary to observe that while a statute, once adjudged invalid by the court of last resort, will continue inoperative as long as that decision is maintained, yet a later decision,

[39] Lothrop v. Stedman, 42 Conn. 583; Sutherland v. De Leon, 1 Tex. 250.
[40] Norton v. Shelby Co., 118 U. S. 425, 6 Sup. Ct. 1121.

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sustaining the validity of the statute, will give it vitality from the time of its enactment, and thereafter it is to be treated as having been constitutional from the beginning.[41] Notwithstanding some difference of opinion, the better authorities hold that a repealing clause in an unconstitutional statute (repealing all laws and parts of laws in conflict with it or inconsistent with it) is equally invalid with the rest of the statute, and therefore leaves the former laws untouched.[42]

CONSTRUCTION OF CONSTITUTIONS—METHOD.

47. A constitution is not to be interpreted on narrow or technical principles, but liberally and on broad general lines, in order that it may accomplish the objects of its establishment and carry out the great principles of government.

A constitution "is intended for the benefit of the people, and must receive a liberal construction. A constitution is not to receive a technical construction, like a common-law instrument or a statute. It is to be interpreted so as to carry out the great principles of government, not to defeat them."[43] Constitutions, it is said in another case, "declare the organic law of a state; they deal with larger topics and are couched in broader phrase than legislative acts or private muniments. They do not undertake to define with minute precision in the manner of the latter, and hence their just interpretation is not always to be reached by the application of similar methods."[44] "A constitution of government does not, and cannot, from its nature, depend in any great degree upon mere verbal criticism, or upon the import of single words. Such criticism may not be wholly without use; it may sometimes illustrate or unfold the appropriate sense; but unless it stands well with the context and the

[41] Pierce v. Pierce, 46 Ind. 86. But an act of the legislature which was unconstitutional at the time of its enactment will not obtain validity by a subsequent change in the constitution, authorizing such legislation. Comstock Mill & Min. Co. v. Allen, 21 Nev. 325, 31 Pac. 434.

[42] Campau v. City of Detroit, 14 Mich. 276; Tims v. State, 26 Ala. 165.

[43] Morrison v. Bachert, 112 Pa. St. 322, 5 Atl. 739.

[44] Houseman v. Com., 100 Pa. St. 222.

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subject-matter, it must yield to the latter. While, then, we may well resort to the meaning of single words to assist our inquiries, we should never forget that it is an instrument of government we are to construe, and that must be the truest exposition which best harmonizes with its design, its objects, and its general structure." [45]

SAME—INTENT TO BE SOUGHT.

48. It is a cardinal rule in the interpretation of constitutions that the instrument must be so construed as to give effect to the intention of the people, who adopted it.

49. This intention is to be sought in the constitution itself, and the apparent meaning of the words employed is to be taken as expressing it, except in cases where that assumption would lead to absurdity, ambiguity, or contradiction.

Where the meaning shown on the face of the words is definite and intelligible, the courts are not at liberty to look for another meaning, even though it would seem more probable or natural, but they must assume that the constitution means just what it says. "Whether we are considering an agreement between parties, a statute, or a constitution, with a view to its interpretation, the thing we are to seek is the thought which it expresses. To ascertain this, the first resort in all cases is to the natural signification of the words employed, in the order and grammatical arrangement in which the framers of the instrument have placed them. If, thus regarded, the words embody a definite meaning, which involves no absurdity and no contradiction between different parts of the same writing, then that meaning apparent upon the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed. In such a case, there is no room for construction. That which the words declare is the meaning of the instrument, and neither courts nor legislatures have the right to add to, or take away from, that meaning." [46] But if the words of the constitution,

[45] 1 Story, Const. § 455.

[46] Newell v. People, 7 N. Y. 9, 97; City of Beardstown v. City of Virginia, 76

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thus taken, are devoid of meaning, or lead to an absurd conclusion, or are contradictory of other parts of the constitution, then it cannot be presumed that their prima facie import expresses the real intention. And in that case, the courts are to employ the process of construction to arrive at the real intention, by taking the words in such a sense as will give them a definite and sensible meaning, or reconcile them with the rest of the instrument. And this sense is to be determined by comparing the particular clause with other parts of the constitution, by considering the various meanings, vernacular or technical, which the words are capable of bearing, and by studying the facts of contemporary history and the purpose sought to be accomplished, and the benefit to be secured, or the evil to be remedied, by the provision in question.[47]

Subsidiary Rules of Constitutional Construction.[48]

1. The construction of a constitutional provision is to be uniform.[49]

2. In case of ambiguity, the whole constitution is to be examined, in order to determine the meaning of any part, and the construction is to be such as to give effect to the entire instrument, and not to raise any conflict between its parts which can be avoided.[50]

3. A constitution should be construed with reference to, but not overruled by, the doctrines of the common law and the legislation previously existing in the state.[51]

4. A constitutional provision should not be construed with a retrospective operation, unless that is the unmistakable intention of the words used or the obvious design of the authors.[52]

Ill. 84, 40; City of Springfield v. Edwards, 84 Ill. 626; People v. May, 9 Colo. 80, 10 Pac. 641; 1 Story, Const. § 401; Hills v. City of Chicago, 60 Ill. 86.

[47] People v. Potter, 47 N. Y. 375; Taylor v. Taylor, 10 Minn. 107 (Gil. 81).

[48] These rules are here summarized from Black, Interp. Laws, 13–34, where the reader will find a full discussion of them.

[49] "The policy of one age may ill suit the wishes or the policy of another. The constitution is not to be subject to such fluctuations. It is to have a fixed, uniform, permanent construction. It should be, so far at least as human infirmity will allow, not dependent upon the passions or parties of particular times, but the same yesterday, to-day and forever." 1 Story, Const. § 427.

[50] Manly v. State, 7 Md. 135.

[51] Costigin v. Bond, 65 Md. 122, 3 Atl. 285.

[52] See Town of Cherry Creek v. Becker, 123 N. Y. 161, 25 N. E. 369; Farns-

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5. The provisions of a constitution are almost invariably mandatory; it is only in extremely plain cases, or under the pressure of necessity that they can be construed as merely directory.[53]

6. Whatever is necessary to render effective any provision of a constitution, whether the same be a prohibition, or a restriction, or the grant of a power, must be deemed implied and intended in the provision itself.[54]

7. Where the constitution grants a power in general terms, the grant includes all such particular and auxiliary powers as may be necessary to make it effectual. Where the means for the exercise of a granted power are specified, all other means are understood to be excluded. Where the means are not specified, any means may be resorted to which are fairly and properly adapted to accomplish the object of the grant of power, if they do not unnecessarily interfere with existing interests or vested rights.[55]

8. The words employed in a constitution are to be taken in their natural and popular sense, unless they are technical legal terms, in which case they are to be taken in their technical signification.[56]

9. The preamble to a constitution and the titles of its several articles or sections may furnish some evidence of its meaning and intention, but arguments drawn therefrom are entitled to very little weight.[57]

10. It is not permissible to disobey, or to construe into nothingness, a provision of the constitution merely because it may appear to work injustice, or to lead to harsh or obnoxious consequences or invidious and unmerited discriminations, and still less weight should be attached to the argument from mere inconvenience.[58]

worth v. Railroad Co., 83 Me. 440, 22 Atl. 373. But compare In re Gibson, 21 N. Y. 9.

[53] Varney v. Justice, 86 Ky. 596, 6 S. W. 457; People v. Lawrence, 36 Barb. 177.

[54] Endl. Interp. St. § 535; 1 Story, Const. § 430.

[55] Field v. People, 2 Scam. (Ill.) 79.

[56] Greencastle Tp. v. Black, 5 Ind. 557; The Huntress, Davels, 82, Fed. Cas. No. 6,914; People v. Fancher, 50 N. Y. 288.

[57] Houseman v. Com., 100 Pa. St. 222.

[58] Greencastle Tp. v. Black, 5 Ind. 557; Weill v. Kenfield, 54 Cal. 111; County of Wayne v. City of Detroit, 17 Mich. 390; Oakley v. Aspinwall, 3 N. Y. 547, 568; People v. May, 9 Colo. 80, 10 Pac. 641.

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11. If an ambiguity exists which cannot be cleared up by a consideration of the constitution itself, then, in order to determine its meaning and purpose, resort may be had to extraneous facts, such as the prior state of the law, the evil to be remedied, the circumstances of contemporary history, or the discussions of the constitutional convention.[59]

12. The contemporary construction of the constitution, especially if universally adopted, and also its practical construction, especially if acquiesced in for a long period of time, are valuable aids in determining its meaning and intention in cases of doubt; but these aids must be resorted to with caution and reserve, and they can never be allowed to abrogate, contradict, enlarge, or restrict the plain and obvious meaning of the text.[60]

13. Where a clause or provision in a constitution, which has received a settled judicial construction, is adopted in the same words by the framers of another constitution, it will be presumed that the construction thereof was likewise adopted.[61]

14. The office of a schedule to a constitution is temporary only, and its provisions will be understood as merely transitory, wherever that construction is logically possible. The schedule should not be allowed to abrogate or contradict the provisions of the permanent part of the constitution.[62]

15. The principle of stare decisis applies with special force to the construction of constitutions, and an interpretation once deliberately put upon the provisions of such an instrument should not be departed from without grave reasons.[63]

[59] Mayor, etc., of Baltimore v. State, 15 Md. 376; Cronise v. Cronise, 54 Pa. St. 255; Com. v. Balph, 111 Pa. St. 365, 3 Atl. 220; People v. May, 9 Colo. 80, 10 Pac. 641.

[60] People v. May, 9 Colo. 80, 10 Pac. 641; 1 Story, Const. §§ 406, 407.

[61] Ex parte Roundtree, 51 Ala. 42; Jenkins v. Ewin, 8 Heisk. (Tenn.) 456.

[62] Com. v. Clark, 7 Watts & S. (Pa.) 127; State v. Taylor, 15 Ohio St. 137.

[63] Maddox v. Graham, 2 Metc. (Ky.) 56.

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CHAPTER V.

THE THREE DEPARTMENTS OF GOVERNMENT.

50. Classification of Governmental Powers.
51. Separation of Governmental Powers.
52–53. The Separation not Absolute.
54. Limitations on the Three Departments of Government.
55. Political Questions.
56. Advisory Opinions by the Courts.

CLASSIFICATION OF GOVERNMENTAL POWERS.

50. The powers of government are divided into three classes, to wit:

(a) Legislative.

(b) Executive.

(c) Judicial.

Constitutional government is a government by law. The office of the state is to establish and maintain laws. But law in its application to the individual presents itself in three aspects. It is a thing to be ordained, a thing to be administered, and a thing to be interpreted and applied. There is, therefore, a natural threefold division of the powers and functions of the state in the idea of government by law. First, there is the power to ordain or prescribe the laws, which includes, incidentally, the power to change, amend, or repeal any existing laws. This is called the "legislative" power. Second, there is the power to administer the laws, which means carrying them into practical operation and enforcing their due observance. This is denominated "executive" power. Third, there is the power to apply the laws to contests or disputes concerning legally recognized rights or duties between the state and private persons, or between individual litigants, in cases properly brought before the judicial tribunals, which includes the power to ascertain what are the valid and binding laws of the state, and to interpret and construe them, and to render authoritative judgments. This is called "judicial" power.

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The fundamental distinction between legislative and judicial power is the difference between ordaining and applying. The legislative power creates a rule of law which did not before exist, or at least did not exist as a statutory rule. The judicial power creates nothing. It simply takes the law as it finds it at the moment of decision, and determines what application, if any, it has to the matters under judicial consideration.[1] A second distinction is found in the fact that legislative power declares what the law in the future shall be, while judicial power ascertains and declares what the law is at the present time, or what it was at a period of past time when the facts in controversy arose.[2]

SEPARATION OF GOVERNMENTAL POWERS.

51. All American constitutions, state and federal, provide for the separation of the three great powers of government and their apportionment to distinct and independent departments of the government.

It is a fundamental maxim of political science, recognized and carried into effect in the federal constitution and the constitutions of all the states, that good government and the protection of rights require that the legislative, executive, and judicial powers should not be confided to the same person or body, but should be apportioned to separate and mutually independent departments of government.[3]

[1] "A judicial act is the determining of the rights of parties by the application of those rules of law which the court finds to exist to facts which are either admitted or proved; while a legislative is the establishment of a new rule for the future. The new rule may be made either for one or a few individuals alone, in which case it is termed a special act, or for the entire community, when it is denominated a general statute." 1 Bish. Mar. & Div. § 682.

[2] "To enact laws, or to declare what the law shall be, is legislative power. To interpret law—to declare what the law is or has been—is judicial power." Wolfe v. McCaull, 76 Va. 876. "Legislative power is the power to enact, alter, and repeal laws, while judicial power is the power to construe and interpret the constitution and laws, and to render judgments and make decrees determining private controversies." Hovey v. State, 119 Ind. 395, 21 N. E. 21. And see Wayman v. Southard, 10 Wheat. 1; Smith v. Strother, 68 Cal. 194, 8 Pac. 852.

[3] Sill v. Village of Corning, 15 N. Y. 297, 303.

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The idea of an apportionment of the powers of government, and of their separation into three co-ordinate departments, is not a modern invention. It was suggested by Aristotle in his treatise on Politics,[4] and was not unfamiliar to the more advanced of the medieval jurists. But the importance of this division of power, with the principle of classification, were never fully apprehended, in theory, until Montesquieu gave to the world his great work on the "Spirit of the Laws." Since then his analysis of the various powers of the state has formed part, as Maine says,[5] of the accepted political doctrine of the civilized world. Montesquieu says: "In each state there are three sorts of power; the legislative power, executive power with relation to matters depending on international law, and executive power with relation to matters depending on the civil law. . . . . The last is called judicial power. . . . . If the legislative power is united, in the same person or body of magistrates, with the executive power, there is no liberty; for it is to be apprehended that the monarch or the senate, as the case may be, will make tyrannical laws in order to execute them tyrannically. Neither is there any liberty if the judicial power is not separated from the legislative and the executive power. If it were joined with the legislative power, there would be arbitrary authority over the life and liberty of the citizens; for the judge would be the law-maker. If it were joined with the executive power, the judge would have the might of an oppressor. All would be lost if the same man, or the same body of chiefs, or of nobles, or of the people, exercised these three powers, that of making the laws, that of executing the public resolutions, and that of judging the crimes or controversies of individuals."[6] The framers of our constitution were strongly influenced by these opinions of the French jurist, to whose views, in general, they were disposed to pay great deference, as is fully apparent from the pages of the Federalist. And though the British constitution, as it stood at that time, furnished a precedent for a partial and limited independence of the several departments of government,[7] it is not probable that the constitution of the United

[4] Book 6, c. 11, § 1; 2 Wools. Pol. Science, 259.
[5] Maine, Popular Government, 219.
[6] Montesq. Esprit des Lois, liv. 11, c. 6.
[7] See 1 Bl. Comm. 146, 154.

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States would have carried out this principle of division as thoroughly as it did, and particularly in securing the independence of the judiciary, had it not been for the attention paid to the writings mentioned, and the conviction of the framers as to the soundness of the views therein expressed.

It requires a constitutional provision to effect the separation of the three departments of government. That is to say, if it is not otherwise provided by the constitution, the power to execute and interpret the laws, or to dispose of the executive and judicial duties, will belong to the legislative department, as being the repository of the general authority to enact laws.[8] And in American history, prior to the revolution, the separation of these functions was by no means an invariable rule.[9] But this important principle of civil liberty and good government is now recognized and secured throughout the states by the provisions of the constitutions. It is to be observed, however, that, as regards each state, it depends upon the constitution of the state. There is nothing in the federal constitution which forbids the legislature of a state to exercise judicial functions.[10]

Independence of the Judiciary.

In making secure provision for the independence of the judicial department, the framers of the federal constitution went far beyond the limits then established in the constitution of the mother country. Yet the conception of the judiciary as guardians of the constitution existed in the English system, and had been put forward as a bulwark against the encroachments of the king or the parliament on many notable occasions. More than once had the English judges resolutely set their faces against unlawful extensions of the royal prerogative, and refused to carry into effect the grants or decrees of the king when contrary, in their judgment, to

[8] "When any of the duties or powers of one of the departments of the state government are not disposed of, or distributed to particular officers of that department, such powers or duties are left to the disposal of the legislature." Ross v. Whitman, 6 Cal. 361. And see Sawyer v. Dooley, 21 Nev. 390, 32 Pac. 437.

[9] See Calder v. Bull, 2 Root (Conn.) 350.

[10] Satterlee v. Matthewson, 2 Pet. 380, 413.

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"the law of the land," that is, the constitution.[11] The American doctrine is that the judicial department is an independent, co-ordinate branch of the government, neither superior, inferior, or ancillary to either of the others. It is not to be controlled or dictated to by the legislature. Nor, on the other hand, in the exercise of such powers as are involved in adjudging the unconstitutionality of a statute, does it assume any supervisory authority or control over the legislative department. It is inherently the weakest of all, but is sustained by the public appreciation of the need of independent tribunals and the public confidence in the judges.[12]

THE SEPARATION NOT ABSOLUTE.

52. The separation of the three departments of government is a general principle, but not a rule of absolute exclusion.

53. The constitutions, in a limited number of cases, provide for, or allow of, the exercise by each department of powers theoretically belonging to the others, because

(a) Each department possesses auxiliary powers necessary to its own maintenance and efficiency.

(b) A blending of governmental powers permits each department to act as a check upon the arbitrary or impolitic action of the others.

(c) Certain powers are of a mixed or composite nature, or not distinctly assignable to either department.

Under the American system of government, the separation of the powers of government, though not absolute, is carried far enough to insure the proper independence of each department and to prevent either from encroaching upon the functions of the others or

[11] Among the cases of this kind to which the attention of the student should be particularly directed are the following: In re Cavendish, 1 And. 152; Darcy v. Allen (Case of Monopolies), Moore, 671; Case of Ship-Money, 3 How. St. Tr. 825; Case of Proclamations, 12 Coke, 74; Thomas v. Sorrell, Vaughan, 330; Bates' Case, 2 How. St. Tr. 371. Compare Godden v. Hales, 2 Show. 475.

[12] U. S. v. Lee, 106 U. S. 196, 223, 1 Sup. Ct. 240.

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usurping their authority. There are three principal reasons why the apportionment of these powers is not made absolutely exclusive.

First Reason.

Each department must possess such powers as are necessary to the preservation of its independence and dignity, and to enable it to discharge its appropriate functions. It is for this reason that each house of a legislature is empowered to judge of the election and qualification of its own members, and to appoint or elect its own officers, though appointments to office usually belong to the executive. So also the courts are frequently allowed to appoint their inferior ministerial officers, as well as to admit attorneys to practice before them, and usually to make rules of practice. So the executive department may make rules and regulations for the administration of the public business belonging to its sphere, and put its own practical construction upon the laws, subject to the interpretation of the courts.

Second Reason.

A certain mixture of powers furnishes a system of checks and balances, and tends to make the whole government stronger and more compact and harmonious. The veto power is a conspicuous illustration of this reason. By it the executive is enabled to take part in the making of laws, not, indeed, by way of initiative, nor absolutely in any event, but so far as to establish a salutary check on hasty, unwise, or unjust legislation. The requirement that the federal executive shall make appointments to office "by and with the advice and consent of the senate" is another example of the blending of executive power with legislative functions, for the purpose of establishing a check on arbitrary power. The power of impeachment vested in the legislative department is a grant of judicial authority to that body with a view to correcting any tendency to usurpation or malfeasance on the part of either of the other departments. And the pardoning power should be mentioned here, as it amounts to an authority to alter or reverse the sentences of the judicial department in criminal cases, but is lodged with the executive as a means of correcting failures of justice in the courts.

Third Reason.

There are, as above stated, certain powers or functions, chiefly of minor importance, which are in their nature mixed or composite,

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or which are not distinctly and unmistakably referable to the proper field of activity of either of the departments of government. Thus, although the courts have control over litigation pending before them, it is admitted that the matter of pleading and practice is a proper subject of legislative regulation.[18] So it is, also, with declaratory or expository statutes. It is the peculiar function of the judicial department to interpret and expound the laws; yet acts of legislation explaining prior statutes, and declaring what their true meaning shall be taken to be, are not invalid, at least in so far as they operate prospectively only. To this head also must probably be referred the participation of the United States senate with the President in the making of treaties. A treaty is in the nature of a contract with a foreign power, and therefore belongs to the executive department; but it is also the supreme law of the land, and therefore should be sanctioned by at least one house of congress.

LIMITATIONS ON THE THREE DEPARTMENTS OF GOVERNMENT.

54. The principle of the separation of the three departments of government imposes upon each the limitation that it must not usurp the powers nor encroach upon the jurisdiction of either of the others.

The reasons which make the apportionment of governmental powers to different departments important to good and just government also require that each of the departments should be recognized as co-ordinate with the others and that all should be esteemed equal in dignity and authority within their respective spheres. This co-ordination and equality would be destroyed unless each branch of the government were placed in a position of independence of the others; and from this necessary independence it follows that neither may lawfully usurp the functions of the others nor encroach upon their rightful sphere of jurisdiction. Further, the principle of their separation requires that neither should be charged with duties foreign to the field of its legitimate activity.

[18] Whiting v. Townsend, 57 Cal. 515.

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Constitutional Provisions.

As the rule, it may be said that the American state constitutions now divide the powers of government, and provide that no person or body belonging to one branch shall exercise powers or functions belonging to the others. But even in the absence of such an explicit declaration, the creation of the several departments and the description of their respective powers would be sufficient to secure each against encroachments by the others. Thus, the federal constitution declares that "all legislative powers herein granted shall be vested in a congress of the United States"; that "the executive power shall be vested in a President"; and that "the judicial power of the United States shall be vested in one supreme court and in such inferior courts as congress may from time to time ordain and establish." By the first of these provisions the President and the courts are prevented from making laws. By the second, congress and the courts are forbidden to usurp the functions of the executive. By the third, the courts would be justified in declaring invalid any act of congress or act or rule of the executive department which should amount to an attempted exercise of judicial power.

Limitations on Legislative Power—As Respects the Executive.

The legislature cannot lawfully usurp any of the functions confided by the constitution to the executive department. Thus, it is the generally accepted doctrine that appointment to office is an executive function, which cannot be taken away from that department by the legislative branch,[14] although both the legislature and the courts may fill such offices as are incidental to the performance of their own prescribed duties. The legislature may provide by law for the appointment of all officers not provided for in the constitution, but the appointing power must be lodged somewhere within the executive department.[15] And for the same reason an act of the legislature granting a pardon or reprieve (where the pardoning power is vested by the constitution in the executive), or remitting a fine, or authorizing courts to suspend their sentences, would be un-

[14] State v. Hyde, 121 Ind. 20, 22 N. E. 644; Wood v. U. S., 15 Ct. Cl. 151. See Mayor, etc., of Baltimore v. State, 15 Md. 376. Compare People v. Freeman, 80 Cal. 233, 22 Pac. 173.

[15] City of Evansville v. State, 118 Ind. 426, 21 N. E. 267.

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constitutional.[16] But a statute giving to prisoners certain deductions from their term of imprisonment for good conduct does not infringe upon the power of the executive to grant pardons.[17] Equally invalid would be any attempt on the part of the legislature to impose upon the members of the executive department powers or duties more properly belonging to the legislature itself or to the courts.

Same—As Respects the Judiciary.

The faculty of judgment clearly belongs to the legislature in so far as it has the right to determine upon the policy or expediency of the bills presented for its action, and as regards the ascertainment of the facts and circumstances upon which its legislative action is to be based, and also it must judge for itself of the existing state of the law when it is proposed to make changes by new enactments. But any act of legislation which should undertake to determine questions of fact or law, as affecting the rights of persons or property properly the subject of litigation, would be judicial in its character and therefore invalid.[18] Thus, to ascertain that a deed to a private corporation is conditional, that there has been a breach of the condition, and to enforce a forfeiture for the breach, are judicial functions, which it is not within the competency of the legislative power to exercise.[19] So, the legislature cannot enact that the money appropriated to pay the salary of a state office must be paid to a certain one of two adverse claimants of the office, since that would amount to an adjudication upon such claimant's title to the office.[20] Nor can the legislature assume to ascertain and fix the amount due to a creditor of the state, although it may appropriate or set apart a specified sum of money to pay such creditor, for that is no more than a tender, such as any debtor may make to his creditor, and which the latter may accept or refuse.[21] Neither can the legislature lawfully direct the courts as to what judgments they shall enter in

[16] Haley v. Clark, 26 Ala. 439; Ogletree v. Dozier, 59 Ga. 800; Butler v. State, 97 Ind. 373. See The Laura, 114 U. S. 411, 5 Sup. Ct. 881.

[17] Ex parte Wadleigh, 82 Cal. 518, 23 Pac. 190.

[18] Ponder v. Graham, 4 Fla. 23.

[19] Board of Education v. Bakewell, 122 Ill. 339, 10 N. E. 873.

[20] State v. Carr, 129 Ind. 44, 28 N. E. 88.

[21] McLaughlin v. County Com'rs, 7 S. C. 375.

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given cases or classes of cases, or what the judgment shall be when the court is equally divided in opinion.[22] And "the legislature has no right, directly or indirectly, to annul in whole or in part a judgment or decree of a court already rendered, or to authorize the courts to reopen and rehear judgments and decrees already final, by which the rights of the parties are finally adjudicated, fixed, and vested; every such attempt of legislative action is plainly an invasion of judicial power."[23] Thus, when an action or other judicial proceeding has been tried and a decision rendered, the legislature cannot, by an act subsequently passed, grant a new trial,[24] or grant a writ of error after the right to the same has become barred by lapse of time, or after the appellate court has finally adjudicated the case.[25] On a similar principle, the legislature cannot, by a statutory enactment, declare an act of its own to be either constitutional or void, though it may repeal any law (subject to any rights which may have been acquired under it) on the assumption that it was valid when enacted.[26] Expository statutes, the office of which is to declare what shall be taken to be the true meaning and intent of a law already in force, are valid if they are to apply only to controversies thereafter arising; but in so far as they are intended to have a retrospective operation, that is an unlawful assumption of judicial power and invalid.[27] And although, to a considerable extent, the rules of evidence are under the control of the legislature, it is not competent for that body to make a rule which shall in effect finally deter-

[22] Northern v. Barnes, 2 Lea (Tenn.) 603.

[23] Ratcliffe v. Anderson, 31 Grat. (Va.) 105. See, also, De Chastellux v. Fairchild, 15 Pa. St. 18; Miller v. State, 8 Gill (Md.) 145.

[24] State v. Flint, 61 Minn. 539, 63 N. W. 1113.

[25] McCabe v. Emerson, 18 Pa. St. 111.

[26] In re County Seat of La Fayette County, 2 Chand. (Wis.) 212.

[27] Koshkonong v. Burton, 104 U. S. 668; Gorman v. Commissioners, 25 Fed. 647; Singer Manuf'g Co. v. McCullock, 24 Fed. 667; Lambertson v. Hogan, 2 Pa. St. 22; Greenough v. Greenough, 11 Pa. St. 489; Reiser v. Association, 39 Pa. St. 137; Todd v. Clapp, 118 Mass. 495; Shallow v. City of Salem, 136 Mass. 136; Dash v. Van Kleeck, 7 Johns. 477; People v. Board of Sup'rs of New York, 16 N. Y. 424; Lincoln Bldg. & Sav. Ass'n v. Graham, 7 Neb. 173; Kelsey v. Kendall, 48 Vt. 24; McNichol v. Reporting Agency, 74 Mo. 457; McManning v. Farrar, 46 Mo. 376; Dequindre v. Williams, 31 Ind. 444; James v. Rowland, 52 Md. 462.

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mine controversies and deprive the courts of their functions. Thus, a tax deed cannot be made conclusive evidence in respect to the merits of the controversy in which it appears.[28] Nor can the legislature take away from courts created by the constitution the power to punish for contempt, although reasonable regulations by that body touching the exercise of this power are binding.[29] But, on the other hand, a legislative act of divorce is not an unconstitutional encroachment upon the office of the judiciary, if it proceeds no further than to the dissolution of the relation of marriage, without affecting property rights of the parties.[30]

Limitations on Executive Power.

It is not competent for the executive officers of the government to assume any share in the making of laws. Their business is merely to enforce the laws.[31]

Aside from the few cases in which the executive is charged with quasi-judicial powers (as in the instance of his authority to grant pardons), the independence of the judicial department requires that it should be free from his control, authority, or influence. It is his duty to execute the judgments and sentences of the courts. He cannot suspend the operations of the tribunals in their regular duty of administering the laws nor supersede their authority, unless in case of war, or, to a limited extent, by a declaration of martial law, nor has he the power, under our constitutions generally, to remove the judges from their office. The chief executive of a state or of the nation has the right, and it is his duty, in considering a legislative bill awaiting his approval, to judge for himself as to its constitutional validity, and especially where its tendency is to encroach upon his own powers. But when once the measure has been enacted as a law, with or without his assent, he ought to as-

[28] Callanan v. Hurley, 93 U. S. 387; McCready v. Sexton, 29 Iowa, 356.

[29] Wyatt v. People, 17 Colo. 252, 28 Pac. 961.

[30] 1 Bish. Mar. & Div. §§ 680–686.

[31] The governor of an English colony has not, by virtue of his appointment, the sovereign authority delegated to him, and an act done by him, legislative in its nature, on his own authority, unauthorized either by his commission, or expressly or impliedly by any instructions, is not equivalent to such an act being done by the crown itself, and is not valid. Cameron v. Kyte, 3 Knapp, 332.

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sume that it is in accordance with the constitution and proceed to enforce it. And when the validity of the act has been passed upon by the courts, the executive is as much bound by their decision as any private citizen. It would be a gross trespass upon the functions of the judicial department if he should attempt to enforce a law which they had pronounced invalid, or refuse to execute a statute which had passed their scrutiny, in accordance with his private judgment.

Limitations on Judicial Power—As Respects the Legislature.

The judicial department is not to make the law, but to interpret and administer it. Nevertheless it is well known that much of the law actually administered in our courts does not owe its existence to legislative enactment, or even to the adoption of the common law, but to the interpretations of the courts, to their enforcement of custom, to the growth of lines of precedents, and to the development of the system of equity. But the gradual formation of this body of law, called "case-law" or "judge-made law," is not regarded as an infraction of the principle under consideration, or as an usurpation of legislative power by the courts. But as regards statutes, not unconstitutional, it is the plain duty of the courts to apply them as they find them. For instance, the correctness or incorrectness of a legislative opinion on which an act is founded is not a question within the province of the courts to determine; they must assume the fact to be as the legislature states or assumes it.[32] Another application of the main rule teaches us that legislative powers cannot be imposed upon the judicial department. For example, a statute authorizing a court to assess county taxes is unconstitutional, as it orders a judicial tribunal to do a legislative act.[33]

Same—As Respects the Executive.

There are but few conceivable cases in which the judicial department could usurp purely executive functions or attempt the performance of purely executive acts. But the importance of the principle, in this connection, is discovered in the rule that the courts must arrogate no supervision or control over the executive

[32] People v. Lawrence, 36 Barb. 177.

[33] Hardenburgh v. Kidd, 10 Cal. 402. See, also, Vaughn v. Harp, 49 Ark. 160; Ex parte Griffiths, 118 Ind. 83, 20 N. E. 513.

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department in the discharge of its proper duties. The judiciary does not possess, and cannot exercise, any revisory power over executive duties.[84] Thus the courts have no authority to require the chief executive of the state by mandamus, or forbid him by injunction, to perform any executive act which is political in its character, or which involves the exercise of judgment or discretion. At the same time, it is generally (though not universally) conceded that if the duty sought to be enforced is one within the scope of the governor's powers, but is merely ministerial in its nature, not political and not involving the exercise of judgment or discretion, but simply obedience to the commands of positive law, then, if the rights of private persons depend upon the performance of this duty by the executive, the writ of mandamus may issue to compel him.[85] The rule settled by the United States courts in this regard is that they "will not interfere by mandamus with the executive officers of the government [such as the heads of departments or bureaus] in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the courts having no appellate power for that purpose. But when they refuse to act in a case at all, or when, by special statute or otherwise, a mere ministerial duty is imposed upon them, that is, a service which they are bound to perform without further question, then, if they refuse, mandamus will be issued to compel them." [86]

[84] Astrom v. Hammond, 3 McLean, 107, Fed. Cas. No. 596.

[85] Harpending v. Haight, 39 Cal. 189; State v. Fletcher, 39 Mo. 388; People v. Bissell, 19 Ill. 229; People v. Yates, 40 Ill. 126; State v. Chase, 5 Ohio St. 528.

[86] U. S. v. Black, 128 U. S. 40, 9 Sup. St. 12; Marbury v. Madison, 1 Cranch, 137; U. S. v. Schurz, 102 U. S. 378; Gaines v. Thompson, 7 Wall. 347; Secretary v. McGarrahan, 9 Wall. 298; Noble v. Union River L. R. Co., 147 U. S. 165, 13 Sup. Ct. 271; Board of Liquidation v. McComb, 92 U. S. 531; U. S. v. Blaine, 139 U. S. 306, 11 Sup. Ct. 607; Decatur Bank v. Paulding, 14 Pet. 497. Mandamus will not lie to compel the secretary of state to pay over to a private citizen money collected by the United States from a foreign government, under arbitration or by diplomatic intervention, as indemnity for injuries inflicted by such foreign power or its subjects upon such citizen. There is no element of contract between the latter and the United States, nor is the fund held in trust for him in such sense that he can require its payment to him by process of law. U. S. v. Bayard, 4 Mackey (D. C.) 310.

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POLITICAL QUESTIONS.

55. Questions which are of a political nature are not the subject of judicial cognizance; courts will leave the determination of them to the executive and legislative departments of the government.

Chief Justice Marshall, at an early day, observed that "questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." [87] And it is a well-settled general rule that no court will undertake to decide questions of this sort. When such questions arise in the course of litigation, the courts will refuse to take jurisdiction of the action, if it necessarily involves such a determination, or, if the question has been settled by the action of the political departments of the government, the judiciary will accept and follow their conclusions without question.[88] There are two reasons for this rule. In the first place, courts ought not to usurp the functions of the political branches of the government nor intrude upon their jurisdiction, And, second, in public affairs of the state or nation, such as may be made the basis of executive or legislative action, the judicial tribunals must not hamper or embarrass the other departments by prejudging the questions which they will have to decide, or attempting to review their decisions already made.

[87] Marbury v. Madison, 1 Cranch, 137, 170.

[88] A good illustration of this rule is found in the case of Georgia v. Stanton, 6 Wall. 50. It was a bill filed by the state of Georgia against the Secretary of War, the general of the army, and the commander of the third military district, to restrain them from executing the "Reconstruction Acts" of congress, on the ground that such execution would annul and abolish the existing state government of Georgia, and establish another and different one in its place. The bill also alleged the ownership by Georgia of certain real and personal property, including the state capitol and executive mansion, and that the execution of the acts would deprive plaintiff of the possession and enjoyment of its property. It was held that the rights thus sought to be protected, being rights of sovereignty, of political jurisdiction, of government, of corporate existence as a state, with its constitutional powers and privileges, the questions presented were political questions merely, belonging to the two great political departments of the government, and not the subject of judicial cognizance.

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The question which of two opposing governments, each claiming to be the rightful government of a state, is the legitimate government, is an illustration of the kind of questions which the courts will refuse to decide on the ground of their belonging to the political departments.[39] So, also, it belongs exclusively to the executive and legislative departments to recognize, or refuse to recognize, a new government in a foreign country, claiming to have displaced the old and to have established itself.[40] And who is the sovereign, de jure or de facto, of a given district or territory, is not a judicial but a political question.[41] Again, whether or not a state of war, insurrection, or public hostility, within the limits of the country, or between this country and a foreign power, existed at a given date, and the nature and extent of the war, if any existed, is a question on which the judicial tribunals must follow the political departments and accept their determination as conclusive.[42] Treaties, in so far as they involve the rights of private litigants, may be the subject of judicial cognizance, but not with respect to their execution or their effect on public rights. Thus, no court has power to question, or in any manner look into, the powers or rights recognized by a treaty in the nation or tribe with which it was made.[43] Nor are the courts authorized to inquire or decide whether the person who ratified a treaty on behalf of a foreign nation had the power, by its constitution and laws, to make the engagements into which he entered; if the executive department accepts the treaty as valid, that is enough for the courts.[44] And on the same principle, it is not for the courts to decide "whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty has been voluntarily withdrawn by one party, so that it is no longer obligatory on the other; or whether the views and acts of a foreign sovereign, manifested through his representative here,

[39] Luther v. Borden, 7 How. 1; Thomas v. Taylor, 42 Miss. 651.

[40] Kennett v. Chambers, 14 How. 38.

[41] Jones v. U. S., 137 U. S. 202, 11 Sup. Ct. 80.

[42] Gray v. U. S., 21 Ct. Cl. 340; U. S. v. One Hundred and Twenty-Nine Packages, 2 Am. Law Reg. 419, Fed. Cas. No. 15,941; Gelston v. Hoyt, 3 Wheat. 246, 324.

[43] Maiden v. Ingersoll, 6 Mich. 373.

[44] Doe v. Braden, 16 How. 635.

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have given just occasion to the political departments of our government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise." [45] So, again, the validity of the retrocession to Virginia of that part of her territory which was originally ceded to the United States to form part of the District of Columbia, is settled by the political departments of government and cannot be inquired into by the courts.[46]

But, on the other hand, the ascertainment of the boundary between two states, or between a state and a territory, is not so far political in its nature that the courts may not determine it.[47] Nor is the question of the eligibility of a person elected to executive office in the state government.[48] Neither is the question whether or not an apportionment act (dividing the state into districts for the election of members of the legislature) conforms to the requirements of the constitution.[49]

ADVISORY OPINIONS BY THE COURTS.

56. The courts cannot be required to render their opinions upon questions of law, except in cases actually before them. But in a few of the states, the constitutions empower the executive or legislative departments to demand the opinion of the supreme court on important questions relating to pending measures.

For instance, the constitution of Massachusetts declares that "each branch of the legislature, as well as the governor and council, shall have authority to require the opinions of the justices of the supreme judicial court upon important questions of law and upon solemn occasions." [50] And in five or six other states similar consti-

[45] Taylor v. Morton, 2 Curt. 454, Fed. Cas. No. 13,799.

[46] Phillips v. Payne, 92 U. S. 130.

[47] U. S. v. Texas, 143 U. S. 621, 12 Sup. Ct. 488; Rhode Island v. Massachusetts, 12 Pet. 657.

[48] State v. Gleason, 12 Fla. 190.

[49] State v. Cunningham, 81 Wis. 440, 51 N. W. 724. And see same case, 83 Wis. 90, 53 N. W. 35; People v. Thompson, 155 Ill. 451, 40 N. E. 307.

[50] Const. Mass. c. 3, art. 2.

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tutional provisions are found. But unless the constitution so provides, it is not within the lawful power of the other departments of the government to thus propound questions to the courts and require answers to them. A statute authorizing either house of the legislature to do this is unconstitutional, for the reason that it imposes on the courts duties which are not judicial in their nature.[51] The President of the United States does not possess any authority to require the opinion of the supreme court on questions propounded to them.[52] "In giving such opinions (where authorized by the constitution) the justices do not act as a court, but as the constitutional advisers of the other departments of the government, and it has never been considered essential that the questions proposed should be such as might come before them in their judicial capacity."[53] But it is held that questions relating to the desirability or policy of proposed legislation cannot be thus propounded to the court.[54] "It is well understood, and has often been declared by this court, that an opinion formed and expressed under such circumstances cannot be considered in any sense as binding or conclusive on the rights of parties, but is regarded as being open to reconsideration and revision; yet it necessarily presupposes that the subject to which it relates has been judicially examined and considered, and an opinion formed thereon."[55] A finding of law and fact made by the Court of Claims, at the request of the head of a department, with the consent of the claimant, and transmitted to such department, but which is not obligatory on the department, is not a judgment. The function of the court in such a case is ancillary and advisory only, and hence its decision is not appealable.[56]

[51] In re Application of Senate, 10 Minn. 78 (Gil. 56).
[52] 2 Story, Const. § 1571.
[53] Opinion of the Justices, 126 Mass. 557.
[54] In re Senate Bill 65, 12 Colo. 466, 21 Pac. 478.
[55] Green v. Com., 12 Allen (Mass.) 155.
[56] In re Sanborn, 148 U. S. 222, 13 Sup. Ct. 577.

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CHAPTER VI.

THE FEDERAL EXECUTIVE.

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THE PRESIDENT.

57. The executive power of the United States is vested in a President of the United States, who holds his office during a term of four years.

THE VICE-PRESIDENT.

58. The Vice-President of the United States is elected at the same time with the President and holds his office for the same term. He acts as president of the senate, and succeeds to the presidency in case of the removal of the President from office, or of his death, resignation, or disability.

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ELECTION OF PRESIDENT AND VICE-PRESIDENT.

59. The President and Vice-President are chosen by an electoral college, the members of which are appointed or elected in the several states, each state being entitled to a representation therein equal to the whole number of its senators and representatives in congress.

60. If no candidate for the presidency receives a majority of the votes cast by the electoral college, the President is to be elected by the house of representatives. In a similar contingency, the Vice-President is chosen by the senate.

The method of electing the President and Vice-President is prescribed by the twelfth amendment to the constitution, together with such parts of the first section of the second article as have not been superseded by that amendment. The presidential electors, chosen as therein directed, constitute what is commonly called the "electoral college." It will be observed that congress may determine the time of choosing the electors and the day on which they shall give their votes, which day shall be the same throughout the United States. In pursuance of this power, the day for casting the votes was at first fixed on the first Wednesday of December in every fourth year. But by the statute now in force (Act Jan. 23, 1845), the electors are to be chosen on the Tuesday next after the first Monday of November. But the manner of choosing the electors is left entirely to the individual states. The state legislatures have exclusive power to direct the manner in which the presidential electors shall be appointed. Such appointment may be made by the legislature directly, or by popular vote in districts, or by a general ticket, as the legislature may direct.[1] At the present day, the last mentioned method is almost universally in vogue. The constitution does not prescribe the qualifications of a presidential elector, except in a negative way. No person is eligible to this office who is a "senator or representative, or who holds an office of trust or profit under the United States." And by the third section of the fourteenth amend-

[1] McPherson v. Blacker, 146 U. S. 1, 13 Sup. Ct. 3.

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ment, no person is eligible who has violated an oath previously taken to support the constitution of the United States, by engaging in insurrection or rebellion against the same, or giving aid or comfort to the enemies thereof, unless his disability has been removed by congress. A disqualification for the office of presidential elector, caused by the holding of an office, cannot be removed by the resignation of that office after the choosing of the elector but before he comes to cast his vote for President.[2] The courts of a state have jurisdiction of an indictment for illegal voting for presidential electors.[3]

The electors are required to make lists of the votes which they cast, and sign and certify the same, and transmit them sealed to the president of the senate. It is also provided that this officer, in the presence of both houses of congress, shall open all the certificates. The constitution then provides that the votes shall be counted. But it is not prescribed by whom the counting shall be done, nor who shall declare the result. But this is now regulated by statute, the duty being cast upon the president of the senate, who was obviously intended to discharge it. But neither in the original plan nor in the twelfth amendment is any provision made for the determination of questions which may arise as to the regularity or authenticity of the returns or the right or qualification of the electors, or the manner or circumstances in which the votes should be counted. This serious defect in the constitution was made apparent in the memorable contest of 1877. The electoral commission, by which that election was determined, was created only to meet the particular emergency, and was not made applicable to future cases. But since that time, congress has provided regulations for these matters with such care and minuteness of detail that no such dispute is likely ever to recur.[4]

Great importance was attached by the framers of the constitution to the interposition of the electoral college between the passions and prejudices of the undiscriminating multitude of voters and the high office of President. But in no single instance have their designs and theories been more completely frustrated by the

[2] In re Corliss, 11 R. I. 638.

[3] In re Green, 134 U. S. 377, 10 Sup. Ct. 586.

[4] Act Cong. Feb. 8, 1887 (24 Stat. 373); Act Oct. 19, 1888 (25 Stat. 613).

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practical workings of the system than in this. It is well known that at present the electors have no independent choice of the candidates for whom their votes shall be cast. The candidates are nominated by national conventions of the political parties, and the electors have merely the perfunctory task of registering their votes for the candidate of the party by whom they were chosen. Only in very rare instances do the presidential electors find themselves at liberty to exercise their personal judgment or preference. In general, the electoral college is a mere survival.

The house of representatives is to elect the President in case no person has a majority of the electoral votes. In that event, the persons receiving the greatest number of votes (not exceeding three candidates) are to be voted for, the vote is by states, each state having one vote, and a majority of all the states is necessary to elect. In the same contingency, the senate is to choose the Vice-President, voting for the two candidates standing highest on the list.

QUALIFICATIONS OF PRESIDENT.

61. The constitution prescribes the qualifications of the President in three particulars. To be eligible to this office he must

(a) Be a natural born citizen of the United States;

(b) Have attained the age of thirty-five years;

(c) Have been for fourteen years a resident within the United States.

Congress would clearly have no power to add to these qualifications, nor to dispense with any requisite laid down in the constitution. "By residence, in the constitution, is to be understood, not an absolute inhabitancy within the United States during the whole period, but such an inhabitancy as includes a permanent domicile in the United States. No one has supposed that a temporary absence abroad on public business, and especially on an embassy to a foreign nation, would interrupt the residence of a citizen so as to disqualify him for office. If the word were to be construed with such strictness, then a mere journey through any foreign adjacent

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territory, for health or for pleasure, or a commorancy there for a single day, would amount to a disqualification."[5]

VACANCY IN OFFICE OF PRESIDENT.

62. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the office, the same devolves upon the Vice-President. If both these should die, or be incapacitated from discharging the duties of the office, as above, then, by a statutory provision, the office devolves upon certain members of the cabinet, succeeding each other in a prescribed order.

The constitution gives to congress the power by law to "provide for the case of removal, death, resignation, or inability both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly until the disability be removed or a President shall be elected." In pursuance of this power, it was at first provided that, in the case supposed, the president of the senate, or, if there were none, then the speaker of the house of representatives for the time being, should act as President.[6] But this law was repealed by an act passed in 1886[7] wherein it is provided that in default of both a President and Vice-President capable of acting, the heads of departments shall succeed them in the following order: The secretary of state; the secretary of the treasury; the secretary of war; the attorney-general; the postmaster-general; the secretary of the navy; the secretary of the interior. This act settles a question of considerable importance which was left open under the former law. It declares that its terms shall apply only to such among the above named officers as are eligible to the office of President under the constitution and not under impeachment at the time. If the Vice-President becomes acting President, he will hold the office until the expiration of the term for which the President was elected. And so also, it would appear, will a member of the cabinet, succeeding under the terms of the law mentioned above, except in the case where the cause of his succession

[5] 2 Story, Const. § 1479. [6] Rev. St. U. S. §§ 146–150. [7] 24 Stat. 1.

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is a temporary disability of the President, in which event he is only to hold the office until the disability is removed. In view of the possibility of the President desiring to resign his office, a case contemplated by the constitution, it was very important that the method of effecting the resignation should be pointed out, and that there should be some authoritative declaration of the proof of such resignation to be required. This desideratum was met by an early act of congress providing that the resignation shall be made by some instrument in writing, declaring the same, subscribed by the party, and delivered into the office of the secretary of state.[8]

COMPENSATION OF PRESIDENT.

63. The constitution provides that the President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not within that period receive any other emolument from the United States or any of them.

The object of this provision is of course to put the President beyond either the fear or favor of congress, by depriving that body of the power to coerce him into submission to its wishes by cutting off his stipend, or to bribe his compliance by an increase of salary. The salary of the President was at first fixed at $25,000 per annum, and so continued until it was increased to $50,000 by the act of March 3, 1873. As this statute was enacted on the last day of the first term of President Grant, who entered upon his second term on the next following day, it is regarded as having established a precedent to the effect that an increase of salary made after the re-election of a President may govern his compensation during the second term.

[8] Act March 1, 1792, c. 8, § 11 (Rev. St. U. S. § 151).

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OATH OF OFFICE OF PRESIDENT.

64. The constitution requires that the President, before he enters on the execution of his office, shall take the following oath or affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability preserve, protect, and defend the constitution of the United States."

This official oath is usually taken by the President-elect in front of the Capitol at Washington, in the presence of both houses of congress. It is commonly administered by the chief justice of the supreme court, but this is a matter of precedent only, and any person having authority to administer such an oath could legally perform the office. As to the Vice-President, his official oath is not expressly provided for in the constitution, but it falls within the provision of the last clause of the sixth article, which requires that "all executive and judicial officers both of the United States and of the several states, shall be bound by oath or affirmation to support this constitution." And if he succeeds to the presidency, he then takes the oath of office prescribed for the President.

With general reference to the oath taken by officers to support the constitution, it may be said that (except as it regards the officer's personal obedience to the constitution) it is to be taken as a political oath. It means that the officer will maintain the supremacy and inviolability of the constitution against disruption by domestic intrigue or foreign aggression.

INDEPENDENCE OF THE EXECUTIVE.

65. In the exercise of his constitutional powers and functions, the President is an independent, co-ordinate branch of the government, not subject to the direction or control of either congress or the courts.

The constitution makes the President of the United States the repository of all the executive power of the nation, thus constituting him a separate department of the government, not inferior to the

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others, but co-ordinate with them, and independent of them. His acts and determinations, within the sphere of his constitutional powers, cannot be controlled, questioned, or overruled by the legislative or judicial departments. He is invested with political discretion, and in the exercise thereof he is responsible to no other person or department of the government. He also has such other incidental privileges and immunities as are necessary to enable him to exercise his powers and discharge his duties without interference or hindrance. "In the exercise of his political powers he is to use his own discretion, and is accountable only to his country and to his own conscience. His decision in relation to these powers is subject to no control, and his discretion, when exercised, is conclusive."[9] The exercise by the President of his executive powers can neither be commanded nor restrained by the ordinary process of the courts. Nor can the discharge of his executive duties be thus compelled, or in any wise interfered with. Thus in the case of State of Mississippi v. Johnson,[10] it was held that a writ of injunction cannot be issued to restrain the President from carrying into execution an act of congress, on the allegation that the act is unconstitutional. Nor can the writ of mandamus be issued to compel the President to perform an act which lies within his political discretion.[11] And since the grant of executive powers to the President necessarily implies that he shall be enabled to exercise them without any obstruction or hindrance, it follows that he cannot be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office, and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability.[12] It is doubtful whether he could be compelled tc appear in court in obedience to the writ of subpoena. Such a writ was served on President Jefferson on the trial of Aaron Burr, but he refused to obey it, and the matter was never pressed to a decision.

The exemption of the President from being controlled or interfered with by the process of the courts extends also to the heads of departments and other high executive officers, in so far as re-

[9] 2 Story, Const. § 1569.

[10] 4 Wall. 475. See, also, Georgia v. Stanton, 6 Wall. 50.

[11] Marbury v. Madison, 1 Cranch, 137.

[12] 2 Story, Const. § 1569.

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lates to matters in which they are invested with discretion, or political matters, though not in relation to duties which are merely ministerial, or which do not involve the exercise of any discretion, and where the rights of private parties are concerned.[18] Reference has already been made to this topic, in the first and fifth chapters, in connection with the rule of personal and political responsibility and the independence of the executive department.

VETO POWER OF PRESIDENT.

66. The president has constitutional authority to negative any act or joint resolution of congress, by returning the same with his disapproval.

67. The veto power is subject to two restrictions:

(a) It must be exercised within ten days.

(b) A veto may be overruled by the concurrent vote of two-thirds of both houses of congress.

The constitution provides that every bill passed by the two houses of congress, and also every order, resolution, and vote to which the concurrence of both houses is necessary (except on a question of adjournment) shall, before it becomes a law, be presented to the President. If he approves it, he shall sign it; but if not, he shall return it, with his objections, to the house in which it originated. When a bill is thus returned with a veto message, the house receiving it shall enter the President's objections at large on its journal and proceed to reconsider the bill. The bill may then be passed over the President's veto, by a vote of two-thirds of both houses, the vote being taken by yeas and nays and the names of those voting for and against the measure being entered on the journals. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, it shall become a law in like manner as if he had signed it, unless congress, by their adjournment, prevent its return, in which case it shall not become a law.

This power vested in the President is not executive in its nature, but essentially legislative. It makes him, in effect, a branch of congress, though only to a limited and qualified extent. It operates

[18] Kendall v. U. S., 12 Pet. 527; Marbury v. Madison, 1 Cranch, 137.

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as a check on the enactment of hasty, unwise, or improper laws. The provision which requires the executive to exercise his veto power within ten days, if at all, is a very important and substantial limitation upon this power. For if it were not for this clause, it would be within the power of the President to prevent or indefinitely suspend all legislation which might be personally or politically obnoxious to him, by mere inaction, without being compelled to disclose the ground of his opposition or come before congress and the country with any explanation of his views. And then, by way of a counter check, it is provided that congress shall not rob the executive of his right to exercise this power by terminating its session before the President can act. A further and very important check upon congress, in its relation to the executive in this respect, was rendered necessary by the consideration that the requirement that "every bill" should be sent to the President for his approval might easily be evaded by calling the particular measure an "order" or a "resolution." Hence it was thought good to provide that all orders, resolutions, and votes, to which the concurrence of both houses shall be necessary, save on a question of adjournment, shall take the same course and be subject to the same veto power as a bill.

Extensive as the veto power is, there is yet one particular in which, in the opinion of many publicists, it might profitably be extended. That is, a constitutional amendment might give to the President the authority to disapprove of any particular part or item of a bill which may appear to him to be objectionable. At present, the chief magistrate must act upon the "bill" as a whole. An appropriation bill or a revenue measure may consist of a great number of separable items, some of which, in the judgment of the executive, may be unconstitutional or inexpedient. Yet he must either approve or reject the entire act. He has no power to veto any individual item.

As to the grounds on which the President may exercise this power, the constitution prescribes no limitations. He is merely required to return the bill "with his objections." It is within the scope of his power, and it is probably one of the purposes for which it was given, that he should judge of the constitutionality of all proposed legislation. But he is not restricted to this ground of objection, in

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considering a bill laid before him. He may also judge of its economic or political wisdom, its expediency, its policy, or its relation to other laws or to treaties. In fact, though the ground of his objection should be entirely arbitrary or capricious, or the result of personal feeling or prejudice, still the constitution does not forbid him to make it the basis of a veto. This would merely furnish a reason for the attempt to pass the bill without his approval.

In regard to matters of practice in the signing, approval, and returning of bills, the rules which govern the President and congress are similar to those which prevail in the case of a state governor dealing with bills laid before him for his approval or rejection, in connection with which subject the matter will be more fully discussed. At present it is only necessary to remark that while the President is required to evidence his approval of a bill by his signature thereto, there is no provision of the constitution, nor any just implication therefrom, which imposes upon him the duty of affixing a date to his signature.[14]

MILITARY POWERS OF PRESIDENT.

68. The constitution provides that the President shall be commander in chief of the army and navy of the United States, and of the militia of the several states when called into the actual service of the United States.

It is very important, in this connection, to observe the distinction between the powers and functions of the President and those of congress, and their mutual relations. The subject is best discussed by considering it first with reference to the prevalence of a state of peace, and then in relation to a war footing. In time of peace, the President has two sets of duties to discharge with reference to the army and navy. First, he is the commander in chief, and as such must exercise supreme and unhindered control. Secondly, he "shall take care that the laws be faithfully executed," and in pursuance of this duty he must give due effect to the acts of congress which concern the military and naval establishments. Congress has power to raise and support armies, to provide and maintain a navy, and to

[14] Gardner v. Collector, 6 Wall. 499.

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make rules for the government and regulation of the land and naval forces. Under these grants of authority it may clearly regulate the enlistment of soldiers and sailors, prescribe the number, rank, and pay of officers, provide for and regulate arms, ships, forts, arsenals, the organization of the land and naval forces, courts-martial, military offenses and their punishment, and the like. And all these laws and regulations the President is to carry into effect, not in his character as commander in chief, but as a part of his general executive duty, and with as great or as little choice of means and methods as congress may see fit to confide to him. But again, in virtue of his rank as the head of the forces, he has certain powers and duties with which congress cannot interfere. For instance, he may regulate the movements of the army and the stationing of them at various posts. So also he may direct the movements of the vessels of the navy, sending them wherever in his judgment it is expedient. Neither here nor in a state of war is there any necessary conflict.[15] The President has no power to declare war. That belongs exclusively to congress.[16] But when war has been declared, or when it is recognized as actually

[15] The constitutional power of the President to command the army and navy and that of congress to "make rules for the government and regulation of the land and naval forces" are distinct. The President cannot by military orders evade the legislative regulations, and congress cannot by rules and regulations impair the authority of the President as commander in chief. Swaim v. U. S., 28 Ct. Cl. 173. The President may dismiss an officer from the service of the army or navy. But by Rev. St. U. S. §§ 1229, 1624, it is provided that no officer of the army or navy, in time of peace, shall be dismissed from the service, except upon and in pursuance of the sentence of a court martial to that effect, or in commutation thereof. The President has power, by and with the advice and consent of the senate, to displace an officer in the army or navy by the appointment of another person in his place. Mullan v. U. S., 140 U. S. 240, 11 Sup. Ct. 788. But he has no power to revoke an order dismissing an officer from the service and restoring the discharged officer to his rank. Palen v. U. S., 19 Ct. Cl. 389. When the number of officers in a given rank or grade of the regular army is expressly fixed by law, it is not in the power of the President to make appointments in excess of the limits thus fixed. Montgomery v. U. S., 5 Ct. Cl. 93.

[16] As the power to declare war is vested in congress exclusively, the President has no power to originate a war. But without any declaration of war, or before such declaration is made, he may recognize the actual existence of a state of war, and employ the army and navy against the enemy. The

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existing, then his functions as commander in chief become of the highest importance, and his operations in that character are entirely beyond the control of the legislature. It is true that congress must still "raise and support" the army and "provide and maintain" the navy, and it is true that the power of furnishing or withholding the necessary means and supplies may give it an indirect influence on the conduct of the war. But the supreme command belongs to the President alone. In theory, he plans all campaigns, establishes all blockades and sieges, directs all marches, fights all battles.

Articles of War and Army Regulations.

The "articles of war" comprise a code of military law regulating the discipline and administration of the army and providing for the enforcement of the rules thereby established. These articles are enacted by congress and have the force and authority of statute law, being ordained in the exercise of the constitutional power of congress to "make rules for the government and regulation of the land and naval forces." The "army regulations" are a body of rules having relation to the details of military law and the order and discipline of the military establishment, subordinate to the articles of war and the applicable statutes of congress, but having the force of law within their own sphere and so far as they are not inconsistent with legislative enactments. These regulations are not made by congress, but by the secretary of war for the army, and the secretary of the navy for the naval forces, subject to the approval of the President, from whom they are supposed to emanate. The authority to make them is based either on an express grant of power from congress to the executive, or on the general powers of the President as commander in chief.

Calling Out the Militia.

By an early act of congress (February 28, 1795) it was provided that "in case of an insurrection in any state against the government

Prize Cases, 2 Black, 635. A declaration of war by congress does not imply an authority to the President to extend the limits of the United States by conquering the enemy's country. That is, he may take possession of the enemy's country, and hold it, as a means of prosecuting the war, but that does not make the conquered territory a part of the United States. It could be annexed to the United States only by the act of the legislative department. Fleming v. Page, 9 How. 603.

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thereof, it shall be lawful for the President of the United States, on application of the legislature of such state, or of the executive (when the legislature cannot be convened) to call forth such number of the militia of any other state or states as may be applied for, as he may judge sufficient to suppress such insurrection." By this act, the power of deciding whether the exigency has arisen upon which the government of the United States is bound to interfere is given to the President. He is to act upon the application of the legislature or of the executive, and consequently he must determine what body of men constitutes the legislature, and who is the governor, before he can act. If there is an armed conflict, the President must of necessity decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the act.[17]

THE CABINET.

69. The President is assisted, in the discharge of his executive duties, by a cabinet or ministry consisting of the heads of the several executive departments.

70. These officers are styled collectively "the cabinet," and individually are known as

(a) The secretary of state.
(b) The secretary of the treasury.
(c) The secretary of the navy.
(d) The secretary of war.
(e) The attorney general.
(f) The postmaster general.
(g) The secretary of the interior.
(h) The secretary of agriculture.

71. The constitution provides that the President may require the opinion in writing of the principal officers in each of the executive departments, upon any subject relating to the duties of their respective offices.

72. The heads of departments are the agents of the President, through whom, in matters of administration, he

[17] Luther v. Borden, 7 How. 1. And see Martin v. Mott, 12 Wheat. 19.

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speaks and acts. They are generally responsible only to the President, and cannot be controlled by congress or the courts, except in regard to specific duties laid upon them by law, or the performance of merely ministerial acts.

It is a noteworthy fact that the provision authorizing the President to require the written opinions of the cabinet officers is the only reference made in the constitution (except for that clause which gives congress power to vest the appointment of inferior officers in the heads of departments) to that very important branch of the executive organization known as the cabinet. The constitution contemplated the formation of executive departments, but left their number and character to be fixed by statute. Accordingly congress has by law established eight of these departments, erecting them in the following order: The departments of state, war, the treasury, and justice in 1789, the post office in 1794, the department of the navy in 1798, the department of the interior in 1849, and the department of agriculture in 1889. The heads of the several departments are appointed by the President, by and with the advice and consent of the senate.

The provision that the President may require the written opinion of the heads of departments on subjects relating to the duties of their offices has several times been resorted to, in exact conformity with the constitution. But the usual practice, from Jefferson's time to the present, has been for the President to assemble the members of his cabinet, at stated times or upon extraordinary occasions, and advise and consult with them, not merely upon subjects relating to the duties of their several departments, but upon all questions of administrative policy, both domestic and foreign. But it must be observed that this is entirely discretionary with the President. It is in him alone that "the executive power" of the United States is vested, and the constitution does not declare that he "shall" receive their advice or opinions. The chief executive is no more legally bound by the recommendations or opinions of his cabinet than he would be by the suggestions of any of his personal and unofficial friends.

The heads of departments, each within his own sphere, are the agents of the President for matters of administration. "The President speaks and acts through the heads of the several departments

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in relation to subjects which appertain to their respective duties," [18] and in general, an order, determination, or rule emanating from the head of a department, in a matter within the scope of his authority and his duties, is in contemplation of law the act or determination of the President.[19] For example, "in all our foreign relations, the President, in performing executive acts imposed by treaty stipulations or otherwise, acts through the department of state and under its official seal; and when a warrant or mandate is signed by the secretary of state, it is the act of the President through the proper executive department of the government." [20] So, again, "the secretary of war is the regular constitutional organ of the President for the administration of the military establishment of the nation; and rules and orders publicly promulgated through him must be received as the acts of the executive, and as such be binding upon all within the sphere of his legal and constitutional authority." [21]

But while the heads of the executive departments are under the direction and control of the President in respect to such duties as involve political action and the exercise of judgment and discretion, and cannot be controlled or coerced by congress or the courts, this principle must not be carried so far as to make them amenable only to the orders of the President in respect to the execution of specific duties imposed upon them by law. From the performance of such duties the President could not relieve them. Nor, if summoned in

[18] Wilcox v. Jackson, 13 Pet. 498, 513; U. S. v. Jones, 18 How. 92; Lockington v. Smith, Pet. C. C. 466, Fed. Cas. No. 8,448; Button v. U. S., 20 Ct. Cl. 428; U. S. v. Cutter, 2 Curt. C. C. 617, Fed. Cas. No. 14,911; In re Neagle, 39 Fed. 833.

[19] Wolsey v. Chapman, 101 U. S. 755.

[20] Ex parte Van Hoven, 4 Dill. 411, Fed. Cas. No. 16,858.

[21] U. S. v. Eliason, 16 Pet. 291. In general, the head of an executive department has authority to make regulations and issue orders, under the directions of the President, with reference to the business or administration of his department, which shall have the force of law to those who are subject to them; but this is subject to the condition that such orders and regulations do not conflict with any act of congress. U. S. v. Symonds, 120 U. S. 46, 7 Sup. Ct. 411; Ex parte Reed, 100 U. S. 13. The head of a department cannot, in a matter involving judgment and discretion, reverse the decision and action of his predecessor, even in a matter relating to the general affairs and management of the business of the department. Lavalette v. U. S., 1 Ct. Cl. 147.

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the courts to account for their failure to discharge them, could they plead that they were accountable only to the executive head. Such a doctrine would vest in the President a dispensing power, which is entirely without warrant in the constitution. Consequently, the courts have power to compel a cabinet officer, by mandamus or otherwise, to perform a simple ministerial act, made his duty by law, and in which a private person alone is interested.[23] When action is required of the President which is judicial in its character and not merely administrative, as when he reviews the sentence of a court-martial, the matter must receive his individual attention. His authority cannot be delegated. He cannot act through the head of a department, but it must appear that the decision is his own judgment, and not merely a departmental order.[23]

With regard to papers in the custody of an executive department which are in the nature of confidential communications between officers of government, or of such a nature that, in the judgment of the head of the department, the disclosure of facts and names given in them would be detrimental to the public service, the rule is that they are privileged, and the law will not enforce the production of them in evidence in a suit between private parties.[24]

PARDONING POWER.

73. The President has power, under the constitution, to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

A pardon is "an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom

[23] Kendall v. U. S., 12 Pet. 524. And see Marbury v. Madison, 1 Cranch, 137; Decatur v. Paulding, 14 Pet. 497. See ante, p. 84.

[23] Runkle v. U. S., 122 U. S. 543, 7 Sup. Ct. 1141. But his action, in such a matter, need not be evidenced under his own hand, but may be shown in other ways. U. S. v. Fletcher, 148 U. S. 84, 13 Sup. Ct. 552.

[24] Anderson v. Hamilton, 8 Price, 244; Beatson v. Skene, 5 Hurl. & N. 838; 1 Greenl. Ev. §§ 250, 251; 15 Op. Attys. Gen. 378; Id. 415; 16 Op. Attys. Gen. 24. Nor can public documents, such as vouchers for the payment of public money, be taken from the custody of one of the departments by a writ of replevin at the suit of a private party. Brent v. Hagner, 5 Cranch, C. C. 71, Fed. Cas. No. 1,839.

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it is bestowed from the punishment which the law inflicts for a crime he has committed."[25] As the pardoning power is a general executive function, we shall, to avoid repetition, postpone a detailed discussion of it to the chapter relating to executive power in the states.[26] At present it is only necessary to call attention to a few points arising under the federal constitution. Although that instrument vests in the President the power to grant reprieves and pardons, it is held that this does not prevent congress from granting amnesty, either before legal proceedings are taken, during their pendency, or after conviction.[27] The pardoning power also includes the power to remit fines, penalties, and forfeitures, and it may in the last resort be exercised for this purpose by the chief executive, although it is in many cases by the laws of the United States confided to the secretary of the treasury, with respect to cases arising under the revenue laws.[28]

THE TREATY-MAKING POWER.

74. The constitution provides that the President shall have power, by and with the advice and consent of the senate, to make treaties, provided that two-thirds of the senators present concur.

75. All treaties which shall be made under the authority of the United States are declared to be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

This power embraces the making of treaties of every sort and condition; for peace or war, for commerce or territory, for alliance or succors, for indemnity, for injuries or payment of debts, for the recognition and enforcement of principles of public law, for the regulation of immigration and the rights of aliens, for rules of navigation, for arbitrations, and in short, for all the varied purposes which the policy or interests of independent sovereigns may dictate in their

[25] U. S. v. Wilson, 7 Pet. 160.
[26] Infra, c. 11, pp. 272–275.
[27] Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644.
[28] The Laura, 8 Fed. 612; Macheca v. U. S., 26 Fed. 845.

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intercourse with each other.[79] Aside from the limitations and prohibitions imposed by the constitution on the federal government, the power of treaty-making is given to that government, without restraining it to particular objects, in as plenipotentiary a form as held by any sovereign in any other society. The only questions which can arise in considering the validity of a treaty are whether it is a proper subject of treaty according to international law or the usage and practice of civilized nations, and whether it is prohibited by any of the limitations of the constitution.[80] But while there is no express limitation on the power of the President as to the scope or the terms of the treaties which he may make, yet his authority is subject to certain restrictions necessarily implied from various parts of the constitution. There is an implied limitation which would prevent the political department from entering into any stipulations calculated to change the character of the government, or to do that which could only be done by the constitution-making power, or which would be inconsistent with the nature and structure of the government or the objects for which it was formed. Treaties may be made, and frequently are made, having reference to commercial intercourse. But the executive could not constitutionally abrogate in this manner the power of congress to "regulate foreign commerce."[81] But the internal polity of the states does not impose any limitation upon the treaty-making power. Thus, the federal government has constitutional power to enter into treaty stipulations with foreign governments for the purpose of restricting or abolishing the property disabilities of aliens or their heirs within the several states.[82] And the United States may, by treaty, release to a foreign government an indebtedness due from that government to a private American citizen; but this will constitute a taking of such citizen's property for public use, and it will be incumbent upon the government to compensate him therefor.[83]

Although a treaty, when concluded, becomes the law of the land, yet the power of treaty-making is not properly legislative but pertains to the political department. For this reason it is confided to the

[79] 2 Story, Const. § 1508.
[80] People v. Gerke, 5 Cal. 381.
[81] Geofroy v. Riggs, 133 U. S. 258, 10 Sup. Ct. 295.
[82] In re Droit d'Aubaine, 8 Op. Attys. Gen. 411; Kull v. Kull, 37 Hun, 476.
[83] Meade v. U. S., 2 Ct. Cl. 224.

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President. But, lest the power should be perverted, by his unwisdom or disloyalty, to the destruction of the country, a check is placed upon it by requiring the ratification of the senate. But it will be observed that the functions of the senate are only advisory, or at most extend to accepting or rejecting the work of the President. He alone has the right to determine whether a treaty shall be made. The senate cannot make a treaty nor dictate its terms. It might indeed advise the making of a treaty, but the President would be in no wise bound to heed its recommendations. Nor is he bound to consult the senate in advance. It may suggest amendments to a completed treaty, but these must be accepted by the President to be of any force. But, again, the latter has no power to make treaties except by and with the advice and consent of the senate, and with the concurrence of two-thirds of its members present. Hence a treaty which has not been thus ratified by the senate is wholly inoperative to affect antecedent laws or rights acquired under them.[84] The signature of the President is essential to the validity of a treaty; and it does not take effect, though ratified by the senate, until he has signed it.[85]

By the law of nations all treaties operating upon purely national rights, as well those for the cession of territory as for other purposes, are binding upon the contracting parties, unless it is otherwise provided in them, from the day they are signed; the ratification of them relates back to the time of signing.[86] But this rule does not apply when the treaty operates on individual rights. There the principle of relation does not apply to such rights which were vested before the treaty was ratified, and in so far as it affects them it is not considered as concluded until there is an exchange of ratifications.[87] If the treaty is self-executing, it takes effect and becomes binding at once.[88] But a treaty containing provisions to be executed in the future is in the nature of a contract, and does not become a rule for the courts until legislative action shall be had on the subject.[89] If the treaty involves the payment of money to the foreign power (as

[84] U. S. v. Frelinghuysen, 2 Mackey (D. C.) 299.
[85] Shepard v. Insurance Co., 40 Fed. 341.
[86] Davis v. Police Jury, 9 How. 280; Garcia v. Lee, 12 Pet. 511.
[87] Haver v. Yaker, 9 Wall. 32; Bush v. U. S., 29 Ct. Cl. 144.
[88] Foster v. Neilson, 2 Pet. 253.
[89] In re Metzger, 1 Parker, Crim. R. (N. Y.) 108.

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in the case of purchase of territory), the very important question arises whether congress is bound as a matter of law to make the necessary appropriations, or whether, by refusing to vote the amount required, that body can nullify the treaty. On this point opinion has always been divided. The position taken by the house of representatives has negatived the idea that there was any such compulsion resting upon it. On the other hand, if congress could thus block the progress of international business wherever appropriations were needed, the President and senate would be stripped of a main division of their constitutional power to make treaties. The only possible answer to the question is that it is the duty of congress to give effect to the treaty by voting the necessary supplies, but that there is no legal method whatever by which it can be coerced into the performance of this duty.[40]

A treaty being the supreme law of the land, any state enactment, whether constitutional or statutory, which is in conflict with it, whether made before or after the treaty, must give way to it.[41] But as regards acts of congress the case is different. Though made by different branches of the government, treaties and statutes are of exactly equal authority. Each is declared to be the "supreme law of the land." As between two laws which are in conflict, and of equal authority, the rule is that "leges posteriores priores contrarias abrogant." Consequently, if the courts are called upon to decide between a treaty and an act of congress, they will endeavor by construction to remove any repugnancy between them. But if this cannot be done—if there is an irreconcilable conflict—then that law, whether statute or treaty, which is of later date must repeal or displace that which was earlier.[42] Such a disregard of the solemn obligations of a treaty as is implied in the enactment of laws inconsistent with it may be a breach of international good faith; but with this the courts have nothing to

[40] On this subject, see 2 Story, Const. § 1840; Miller, Const. p. 181; Turner v. Missionary Union, 5 McLean, 344, Fed. Cas. No. 14,251.

[41] Ware v. Hylton, 3 Dall. 199; In re Race Horse, 70 Fed. 598; Wunderle v. Wunderle, 144 Ill. 40, 33 N. E. 195; Gordon v. Kerr, 1 Wash. C. C. 322, Fed. Cas. No. 5,611.

[42] Foster v. Neilson, 2 Pet. 253; The Cherokee Tobacco, 11 Wall. 616; Whitney v. Robertson, 124 U. S. 190, 8 Sup. Ct. 456; Fong Yue Ting v. U. S., 149

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do. Whether a treaty has been violated by our legislation, so as to furnish a proper occasion of complaint by a foreign government is not a judicial question. To the courts it is simply a question of conflicting laws, the later modifying or superseding the earlier.[43] It should also be noted that an award by arbitrators under a treaty between the United States and another nation, by which the contracting nations agree that the decision of the tribunal of arbitration shall be a final settlement of all questions submitted (such as the award of the Behring Sea tribunal), becomes the supreme law of the land, and is as binding on the courts as an act of congress.[44] But it is held that vested rights which have accrued under, or are guaranteed by, a treaty cannot be divested either by an act of congress or by the actions of the political department of government in the making of subsequent treaties.[45] A court cannot inquire whether a treaty was properly executed, or whether it was procured by undue influence.[46] In the construction and interpretation of a treaty, the courts will follow that adopted by the executive department unless such construction is repugnant to the language or purpose of the treaty.[47]

APPOINTMENTS TO OFFICE.

76. The President has power to appoint the diplomatic and consular agents of the government, the judges of the federal courts, and all other officers of the United States, subject to the following limitations:

(a) The offices to be filled must first be created by the constitution or laws.

U. S. 698, 13 Sup. Ct. 1016; Ropes v. Clinch, 8 Blatchf. 304, Fed. Cas. No. 12,041; North German Lloyd S. S. Co. v. Hedden, 43 Fed. 17; The Welhaven, 55 Fed. 80; In re Clinton Bridge, 1 Woolw. 150, Fed. Cas. No. 2,900; Thingvalla Line v. U. S., 24 Ct. Cl. 256.

[43] In re Ah Lung, 18 Fed. 28. The courts have no power to set themselves up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United States, as a sovereign power, chooses to disregard. Botiller v. Dominguez, 130 U. S. 238, 9 Sup. Ct. 525.

[44] The La Ninfa, 75 Fed. 513.

[45] Eastern Band of Cherokees v. U. S., 20 Ct. Cl. 449.

[46] Leighton v. U. S., 29 Ct. Cl. 288. [47] Castro v. De Uriarte, 16 Fed. 93.

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(b) Officers whose appointment is otherwise provided for in the constitution are not subject to the appointing power of the President.

(c) Nominations must be submitted to the senate, which body has the power, by a majority vote, to reject any of which they do not approve.

(d) Congress may by law vest the appointment of inferior officers in the President alone, in the courts of law, or in the heads of departments.

77. The power of appointing to office includes the power of removing from office, with certain restrictions.

The constitution provides that the President "shall nominate, and by and with the advice and consent of the senate shall appoint, ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law; but the congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments. The President shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session."

With the exception of the small number of offices which are created by the constitution, it is the right and duty of congress to decide what offices shall be created and for what purposes. That is a legislative function. But when the office is brought into existence, it is for the executive to choose the incumbent. For, in order to the effective administration of the government, it is necessary that those officers, at least, whose duties are not merely clerical but involve the exercise of discretion and are political in their character, should be in sympathy with the executive for the time being. But at the same time it was deemed necessary to impose a check upon this great power of the President, lest he should be able, by the unrestrained choice of the federal officers, to subvert the whole administrative machinery of government to his own selfish or disloyal purposes. To this end a power of rejecting unsuitable nominations has been lodged with the senate.

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The offices which are "otherwise provided for" in the constitution are those of President and Vice-President, presidential electors, and the members of the senate and house of representatives. To these must also be added the officers of the two houses of congress, who, according to the constitution, are to be chosen by the respective houses. All other officers of the United States are subject to the joint appointing power of the President and senate, save those inferior officers whose appointment is intrusted by law to the President alone, or to the courts or the heads of departments.

Who are "inferior officers" within the meaning of the constitution? As the term is relative, the question cannot be answered abstractly with any degree of precision. But it has been said that "the word 'inferior' is not here used in that vague, indefinite, and quite inaccurate sense which has been suggested—the sense of petty or unimportant; but it means subordinate or inferior to those officers in whom respectively the power of appointment may be vested, the President, the courts of law, and the heads of departments. It is a word having definite relation to a superior." [48] Practically, however, congress has not gone to this extent in providing for the appointment of inferior officers. As examples of the distinction which is actually made, we may mention the fact that postmasters of the first three classes are appointed by the President and confirmed by the senate, while those of the fourth class are appointed by the postmaster general; and commissioned officers of the navy are likewise appointed by the President subject to the confirmation of the senate, while warrant officers are appointed by the President alone.[49] It should be noticed that appointments to office can be made by the heads of departments only in those cases which congress has authorized by law; and therefore the appointment of an agent of fortifications by the secretary of war, there being no act of congress conferring that power upon that officer, is irregular.[50]

[48] Collins v. U. S., 14 Ct. Cl. 568.

[49] A clerk of a district court is one of the "inferior officers" here meant. In re Hennen, 13 Pet. 230. A receiver of a national bank, who is appointed by the comptroller of the currency with the concurrence of the secretary of the treasury, is an officer of the United States. Platt v. Beach, 2 Ben. 303, Fed. Cas. No. 11,215.

[50] U. S. v. Maurice, 2 Brock. 96, Fed. Cas. No. 15,747.

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Another question of much practical importance is as to when an appointment to office becomes complete, so as to put the appointee beyond the arbitrary will of the executive. This question received very careful consideration in the early and leading case of Marbury v. Madison,[51] wherein it was declared that when a commission has been signed by the President, the appointment is final and complete. The officer has then conferred on him legal rights which cannot be resumed. Neither a delivery of the commission, nor an actual acceptance of the office, is indispensable to make the appointment perfect.

We are next brought to the consideration of the subject of removals from office. The power of appointment necessarily includes the power to remove the appointee for cause. But the question which has been earnestly debated by statesmen and jurists is, where does this power reside, under the constitution? Is it in the President alone, or must the senate concur in a removal proposed by the executive, or is the whole matter within the jurisdiction of congress? On this point the constitution is entirely silent. But the whole course of executive and legislative interpretation of the constitution, from the earliest times until now, as well as the settled precedents, have practically determined that the power to remove public officers, when not otherwise expressly provided for, resides in the President alone. A complete discussion of this matter is beyond our present limits, but the reader may consult the authorities cited in the margin.[52] It should be here mentioned, however, that the construction thus put upon the question was at one time practically reversed by an act of congress. This was the "Tenure of Office Act," so called, passed in 1867.[53] This statute in effect denied to the President the power to remove public officers without the consent of the senate. And it provided that, if good cause for the removal of any officer should arise during a recess of the senate, the President should only have the power to suspend the officer until the next session of the senate. But this statute was repealed

[51] 1 Cranch, 137. See, also, U. S. v. Le Baron, 19 How. 73; 2 Story, Const. § 1546.

[52] 2 Story, Const. §§ 1537–1544; Pom. Const. Law, §§ 647–661; Miller, Const. pp. 156–162.

[53] Rev. St. U. S. § 1767 et seq.

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by an act passed in 1887, which apparently amounts to a concession that the power of removal in such cases belongs to the President alone.[54]

In the case of vacancies happening during the recess of the senate, the President has power to make appointments to such offices, at his own pleasure and discretion, but such appointments hold good only until the end of the next session. There is some doubt as to whether a newly created office, which never has been filled, presents a case of "vacancy" within the meaning of this provision. In practice, the question has been decided both ways. But the plain inferences from the context seem to indicate with sufficient clearness that the constitution originally contemplated only those offices which were in existence and filled before the particular recess began.[55] It has also been ruled by the courts that if a vacancy in an office occurs during the session, but remains unfilled at the end of the session, this is a case of vacancy "happening" during the recess.[56] But the President has no power to anticipate a vacancy and make an appointment in advance to fill it.[57] A commission issued by the President to fill a vacancy in an office, during a recess of the senate, continues in force until the end of the next session of congress, unless sooner determined by the President, even although the person commissioned shall have been in the mean time nominated to the office, and his nomination rejected by the senate.[58]

PRESIDENTIAL MESSAGES.

78. The President is not only empowered, but he is required, from time to time, to give to congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient.

Under the first two Presidents of the Republic, it was the custom for the chief executive to meet the two houses of congress in

[54] 24 Stat. 500.
[55] 2 Story, Const. § 1559; McCrary, Elect. § 237.
[56] In re Farrow, 4 Woods, 491, 8 Fed. 112.
[57] McCrary, Elect. § 257.
[58] In re Marshalship of Alabama, 20 Fed. 879.

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person, at the opening of each session, and address them upon the state of the Union, recommending at the same time such acts of legislation as he deemed important or necessary. But from the time of Jefferson on, it has become the invariable practice for the President to make all his communications to congress, under this clause of the constitution, in writing. An annual message is prepared by the President and delivered to congress by his private secretary. And from time to time he sends to congress special messages relating to particular topics of national interest, often accompanied by correspondence or other documents. The propriety of laying this duty upon the President is at once apparent when we consider how many details in the practical administration of the government are within the personal supervision of the President or the heads of departments, and can be made known to congress only by this means, and how important it is that the legislative body should have the most full and accurate information as to the state of the Union, in order to frame its laws with reference to public needs and interests. Story says that the President "is thus justly made responsible, not merely for a due administration of the existing systems, but for due diligence and examination into the means of improving them." [59] It is also usual for congress to request the President to communicate to it facts or papers in his possession or knowledge which bear upon any subject to which the attention of congress is addressed, either by way of contemplated legislation or of investigation. These requests are always complied with, unless in the judgment of the executive the interests of the nation require that such facts or documents, or the dealings of the executive department with the subject in hand, should for the present be kept secret.

CONVENING AND ADJOURNING CONGRESS.

79. The President may, on extraordinary occasions, convene both houses of congress or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper.

[59] 2 Story, Const. § 1561.

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"The power to convene congress on extraordinary occasions is indispensable to the proper operations and even safety of the government. Occasions may occur in the recess of congress requiring the government to take vigorous measures to repel foreign aggressions, depredations, and direct hostilities, to provide adequate means to mitigate or overcome unexpected calamities, to suppress insurrections, and to provide for innumerable other important exigencies arising out of the intercourse and revolutions among nations."[60] This power is seldom exercised to the extent of calling together both houses of congress in extra sessions. But it is usual for a newly inaugurated President to call an extra session of the senate, for the purpose of confirming the nominations to his cabinet, and considering other important nominations. As to the power to adjourn congress in case of a disagreement as to the time of adjournment, it is said that this power is equally as indispensable as that to convene them. For it is the only peaceable way of terminating a controversy which can lead to nothing but distraction in the public councils.[61]

DIPLOMATIC RELATIONS.

80. By virtue of the treaty-making power combined with the power to receive the diplomatic agents of foreign governments, the President has entire control over the foreign relations of the United States.

The constitution provides that the President "shall receive ambassadors and other public ministers." This grant of authority, together with the treaty-making power, invests the federal executive with entire control over the foreign relations of the United States. It is somewhat remarkable that foreign consuls should not have been mentioned in this clause. For they do not come under the designation of "public ministers," not being diplomatic agents, but mere commercial representatives of foreign powers, and yet they exercise very important powers within their own sphere of action. But the power of the executive to receive them and recognize their credentials may fairly be inferred from other parts of the constitution. And indeed foreign consuls have never been allowed to discharge any functions of of-

[60] Id. § 1562. [61] Id. § 1563.

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fice until they have received the exequatur of the President.[82] The power to receive foreign ministers necessarily implies the power in the President to refuse to receive any particular person accredited to him by a foreign government, whether the ground of his refusal be that he is unwilling to consider the special subject with relation to which the diplomatic agent is sent, or because he prefers not to recognize the accrediting authority as a rightful government, or whether his reasons are merely personal to himself. And after a foreign minister has been received by the President, the latter has the power, for reasons satisfactory to himself, to request the accrediting government to recall the minister, or, in case of refusal or delay in recalling him, to dismiss him or refuse longer to hold relations with him. But the most important feature of the President's diplomatic power is the authority to give recognition to the party or persons claiming to be the rightful government of a foreign country, or to withhold it. The reception of a diplomatic representative is equivalent to a formal recognition by the receiving power that the party or faction sending him is at least the de facto government of that country. And in this respect the constitution appears to give the President unrestrained authority and consequently unlimited discretion. The question has indeed been raised whether congress could not, by a solemn declaration, disavow or repudiate the action of the executive in either giving or withholding recognition of a de facto government. But as no necessity for such a course has yet arisen, the question has remained one of abstract interest only, and has never received an authoritative answer. One principle, however, is certain and well settled. The determination of the question which of two opposing governments, each claiming to be the rightful government of the state or country, is the legitimate power, does not belong to the courts. The judicial department cannot take notice of, or recognize, any new government or sovereignty, until it has been officially recognized by the political departments of the government.[83]

[82] Id. § 1565.

[83] Gelston v. Hoyt, 3 Wheat. 324; U. S. v. Palmer, 3 Wheat. 610, 634, 643; The Divina Pastora, 4 Wheat. 52; The Neustra Senora de le Caridad, 4 Wheat. 497; Rose v. Himely, 4 Cranch, 241; Luther v. Borden, 7 How. 1.

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EXECUTION OF THE LAWS.

81. The President is required by the constitution to "take care that the laws be faithfully executed."

"The great object of the executive department is to accomplish this purpose. And without it, be the form of government whatever it may, it will be utterly worthless for offense or defense, for the redress of grievances or the protection of rights, for the happiness or good order or safety of the people." [64] The President "is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the senate, to appoint the most important of them and to fill vacancies. He is declared to be commander in chief of the army and navy of the United States. The duties which are thus imposed upon him he is further enabled to perform by the recognition in the constitution, and by the creation by acts of congress, of executive departments, which have varied in number from four or five to seven or eight, the heads of which are familiarly called cabinet ministers. These aid him in the performance of the great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfill the duty of his great department, expressed in the phrase that 'he shall take care that the laws be faithfully executed.'" [65] While congress cannot delegate to the President any legislative power, yet it may give him the power, upon ascertaining the existence of a state of facts provided for in the statute, to suspend the operation of an act of congress.[66]

Executive Proclamations.

In English law, a proclamation is "a notice publicly given of anything whereof the king thinks fit to advertise his subjects." In American law, it is a formal and official public notice, issued by the chief executive in his own name, intended for the notice of all persons who may be concerned, announcing some statute or treaty, or some public

[64] 2 Story, Const. § 1564.
[65] In re Neagle, 135 U. S. 1, 10 Sup. Ct. 658.
[66] Field v. Clark, 143 U. S. 649, 12 Sup. Ct. 495.

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act or determination, or intended action, of the executive department, which otherwise might not be so widely or so quickly promulgated. The making of proclamations is not an assumption of legislative powers. These documents have not the force of law, although congress may make the taking effect of an act, or of some of its provisions, depend upon the existence of a state of facts to be ascertained and proclaimed by the President. Proclamations are issued on a great variety of occasions. It is usual in this manner to announce the admission of a new state into the Union; the ratification of a treaty with a foreign power, when it contains provisions which may affect the dealings of private persons; the intention of the United States to maintain a position of neutrality between contending powers, or the intention of the government to enforce the neutrality laws with strictness; the granting of an act of pardon or general amnesty; the reciprocity features of a commercial treaty or tariff act; and the annual appointment by the President of a day of public thanksgiving. Perhaps the most celebrated proclamation ever issued in this country was that by which President Lincoln announced the emancipation of the slaves. The same President, in 1861, issued a proclamation of blockade, announcing his intention to blockade all the ports of the states then in insurrection, and giving neutral vessels fifteen days from the commencement of actual blockade to leave those ports.

The authority of the President to issue proclamations is sometimes derived from acts of congress specifically empowering him to do so in relation to a particular matter, and in other cases appears to be derived from his duty to take care that the laws be faithfully executed. In regard to the observance of neutrality laws, for instance, it may not be obligatory upon the President to warn the people of the consequences attending their infraction, but still it is eminently proper for him, at times when there is danger of a breach of those laws, to advise all persons of the intention of the government with regard to their enforcement.

The custom in the United States is that the President shall sign the proclamation and the secretary of state affix the seal of the United States and attest it. Such documents are commonly published in the newspapers, and also printed with the acts and resolutions of congress in the volumes published at the end of each session. But a proclamation, to be effective, need not be given out through the press;

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it may take effect when it is signed and sealed, although not actually published until some days later.[67]

IMPEACHMENT.

82. Impeachment proceedings, resulting, upon conviction, in removal from office, may be instituted against

(a) The President.

(b) The Vice-President.

(c) All civil officers of the United States.

83. The following offenses render the perpetrator liable to prosecution and trial by impeachment:

(a) Treason.

(b) Bribery.

(c) Other high crimes and misdemeanors.

84. Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold office under the United States.

The federal constitution contains the following provisions relating to the subject of impeachment: The President, the Vice-President, and all civil officers of the United States may be removed from office on impeachment for, and conviction of, treason, bribery, and other high crimes and misdemeanors. The house of representatives has the sole power of impeachment, and the senate the sole power to try all impeachments. When sitting for that purpose, they are to be on oath or affirmation. When the President is tried, the chief justice shall preside. No person shall be convicted without the concurrence of two-thirds of the senators present. Judgment in case of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to law. By an express provision of the constitution, the right of trial by jury does not extend to cases of impeachment.

[67] Lapeyre v. U. S., 17 Wall. 191.

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The persons liable to impeachment under the federal constitution are the President, the Vice-President, and "all civil officers of the United States." This excludes, in the first place, all private and unofficial persons. In the next place, it excludes all officers of the army, navy, and marine corps, because they cannot properly be called "civil" officers, and because they are triable for offenses by courts martial and under the laws of war. It is also settled, by a legislative precedent, that a senator of the United States is not liable to impeachment. In general, so far as the matter can be said to be definitely settled, it appears that the officers liable to this process are those who are commissioned by the President (as provided by section 3, art. 2, of the constitution) excepting those employed in the land and naval forces, but including all the federal judges.[68]

Treason and bribery are well defined crimes. But the phrase "other high crimes and misdemeanors" is so very indefinite that practically it is not susceptible of exact definition or limitation, but the power of impeachment may be brought to bear on any offense against the constitution or the laws which, in the judgment of the house, is deserving of punishment by this means or is of such a character as to render the party accused unfit to hold and exercise his office. It is of course primarily directed against official misconduct. Any gross malversation in office, whether or not it is a punishable offense at law, may be made the ground of an impeachment. But the power of impeachment is not restricted to political crimes alone. The constitution provides that the party convicted upon impeachment shall still remain liable to trial and punishment according to law. From this it is to be inferred that the commission of any crime which is of a grave nature, though it may have nothing to do with the person's official position, except that it shows a character or motives inconsistent with the due administration of his office, would render him liable to impeachment. It will be perceived that the power to determine what crimes are impeachable rests very much with congress. For the house, before preferring articles of impeachment, will decide whether the acts or conduct complained of constitute a "high crime or misdemeanor." And the senate, in try-

[68] Private citizens are not amenable to impeachment; nor can articles of impeachment be preferred against a person after he has gone out of office. State v. Hill, 37 Neb. 80, 55 N. W. 794.

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ing the case, will also have to consider the same question. If, in the judgment of the senate, the offense charged is not impeachable, they will acquit; otherwise, upon sufficient proof and the concurrence of the necessary majority, they will convict. And in either case, there is no other power which can review or reverse their decision.[68]

The constitution provides that the judgment, in cases of impeachment, shall not extend further than to removal from office and disqualification from further office. Since it also provides that the officers who are subject to this process shall be removed from office upon conviction under articles of impeachment, it follows that the party accused, if he is found guilty, must be adjudged to be removed from his office. But it rests in the discretion of the senate whether or not to add to this sentence the judgment of disqualification. The nature of this punishment is political only. Conviction upon impeachment is the single case in which the pardoning power of the President cannot be exercised.

[68] Where, in an impeachment proceeding, the act of official delinquency consists in the violation of some positive provision of the constitution or a statute, which is denounced as a crime or misdemeanor, or where it is a mere neglect of duty, willfully done, with a corrupt intention, or where the negligence is so gross, or the disregard of duty so flagrant, as to warrant the inference that it was willful and corrupt, it is a misdemeanor in office. But where such act results from a mere error of judgment or omission of duty, without the element of fraud, or where the alleged negligence is attributable to a misconception of duty, rather than a willful disregard thereof, it is not impeachable, although it may be highly prejudicial to the interests of the state. State v. Hastings, 37 Neb. 96, 55 N. W. 774. See, further, as to the question what offenses are impeachable, Pom. Const. Law, §§ 717–727; 1 Story, Const. §§ 785, 796–805; Miller, Const. pp. 171, 214. With respect to the introduction of evidence and the quantum of proof required to warrant a conviction, impeachment is essentially a criminal prosecution; hence the guilt of the accused must be established beyond a reasonable doubt. State v. Hastings, 37 Neb. 96, 55 N. W. 774.

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CHAPTER VII.

FEDERAL JURISDICTION.

85–87. Courts of the United States.
88. Judicial Power of the United States.
89. United States as a Party.
90. States as Parties.
91–92. Jurisdiction of Supreme Court.
93–96. Powers and Procedure of Federal Courts.
97. Removal of Causes.

COURTS OF THE UNITED STATES.

85. The constitution provides that the judicial power of the United States shall be vested in one supreme court and in such inferior courts as congress may from time to time establish.

86. The federal judicial system, as established by the constitution and acts of congress, comprises:

(a) The supreme court of the United States.
(b) The circuit courts of appeals.
(c) The circuit courts.
(d) The district courts.
(e) The court of claims.
(f) The court of private land claims.

87. In addition, congress has established or authorized the following local or special tribunals, not a part of the federal judicial system:

(a) The territorial courts.
(b) The courts of the District of Columbia.
(c) Consular courts.
(d) Courts-martial.

Power of Congress to Establish Courts.

The supreme court, being provided for by the constitution, is largely independent of congress. It could neither be abolished nor stripped of any part of its original jurisdiction by any act of

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congress. But the number of the judges of the supreme court is left to the determination of congress. The number might be indefinitely increased. But since a judge of this court could not be lawfully legislated out of his office, the number of the judges could not be diminished in any other way than by providing that vacancies, as they might occur, should not be filled up, until the number of judges was reduced to a prescribed minimum. So the jurisdiction of the court, except in so far as it is granted by the constitution, is within the control of congress, and may be enlarged or restricted as that body may determine.

But the courts of the United States inferior to the supreme court do not derive their judicial powers immediately from the constitution. They depend for their jurisdiction upon congressional legislation.[1] And the discretion of congress in respect to the number, character, and territorial limits of the courts among which it will distribute the judicial power of the United States is unrestricted, except as to the supreme court.[2] However, congress could not lawfully confer any part of the federal judicial power on the courts of a state, nor on any courts not established by its own authority.[3] Since the judges of all the federal courts are to hold their offices during good behavior, it is not within the power of either congress or the President to remove them at pleasure. A more difficult question is as to the power to legislate a judge out of his office by abolishing the court in which he sits. This has in fact been done by congress, and the legislative precedent, as far as it goes, is therefore in favor of the existence of such a power.

The Federal Courts.

The federal system of courts, as at present constituted, consists of the supreme court of the United States, a circuit court of appeals in each of the nine circuits, nine circuit courts, sixty-six district courts, the court of claims, and the court of private land claims. No mention is here made of the territorial courts, which are not constitutional courts, nor of the courts in the District of Columbia.

[1] U. S. v. Hudson, 7 Cranch, 32; Sewing-Machine Companies' Case, 18 Wall. 553.

[2] U. S. v. Union Pac. R. Co., 98 U. S. 569, 602.

[3] Martin v. Hunter, 1 Wheat. 304; Stearns v. U. S., 2 Paine, 300, Fed. Cas. No. 13,341.

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Territorial Courts.

The territorial courts "are not constitutional courts in which the judicial power conferred by the constitution on the general government can be deposited. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the constitution, but is conferred by congress in the execution of those general powers which that body possesses over the territories of the United States."[4] Congress may therefore invest the courts of the territories with as much or as little jurisdiction as it may see fit, or with such measure as appears reasonable, necessary, and adapted to the local conditions prevailing. While the organic act for a territory establishes, and to some extent limits, the jurisdiction of the territorial courts, it generally leaves to the control of the territorial legislature such matters as the regulation of rules of procedure and the forms and modes of pleading.[5] The effect of the admission of a territory as a state of the Union and the erection of federal courts therein is ipso facto to extinguish the territorial government and the territorial courts as courts of the general government. But provision is usually made for continuing the territorial courts as the temporary courts of the state, and for the transfer to the federal courts of such pending causes as are properly of federal cognizance.[6]

Consular Courts.

Congress has provided for courts, called "consular courts," in certain non-christian countries, which are presided over by the United States consul at the port where the court is held, and which are invested with civil and criminal jurisdiction over Americans in that place, but proceed without a jury. Their establishment is authorized by treaties made with foreign countries, granting rights of

[4] American Ins. Co. v. Canter, 1 Pet. 511; Clinton v. Englebrecht, 13 Wall. 434; Forsyth v. U. S., 9 How. 571; Good v. Martin, 95 U. S. 90; McAllister v. U. S., 141 U. S. 174, 11 Sup. Ct. 949.

[5] Sperling v. Calfee, 7 Mont. 514, 19 Pac. 204.

[6] Ames v. Railroad Co., 4 Dill. 251, Fed. Cas. No. 324.

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ex-territoriality to the United States for this purpose. The object is to withdraw citizens of the United States from the operation of the crude, barbarous, or uncertain systems of justice there prevailing. It is held that these are valid courts, and that a judgment of a consular court, passing sentence of death upon an American seaman for a murder committed by him within the jurisdiction of the court, is valid, notwithstanding there was no indictment nor trial by jury, when there was a fair trial before the consul and four assessors. The constitution, it was said, was made for the United States, and not for foreign countries, and can have no operation outside the limits of the United States.[7]

Courts-Martial.

Under the power to "make rules for the government and regulation of the land and naval forces" congress has authority to provide for the trial and punishment of military and naval offenses in the manner practiced by all civilized nations, that is, by courts-martial. But these courts are not a part of the federal judicial system. The power to establish them is not derived from, nor is it connected with, the third article of the constitution, defining the judicial power of the United States; the two powers are entirely independent.[8] "Not belonging to the judicial branch of the government, it follows that courts-martial must pertain to the executive department; and they are in fact simply instrumentalities of the executive power, provided by congress for the President as commander in chief, to aid him in properly commanding the army and navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives."[9] The President is therefore invested with general and discretionary power to order statutory courts-martial by virtue of his capacity as commander in chief, independently of the articles of war or other legislation of congress.[10]

The authority of these courts is strictly limited. A court-martial has no jurisdiction to try or punish any person who is not in the

[7] In re Ross, 140 U. S. 453, 11 Sup. Ct. 897.

[8] Dynes v. Hoover, 20 How. 65; Kurtz v. Moffitt, 115 U. S. 487, 6 Sup. Ct. 148; Wales v. Whitney, 114 U. S. 564, 5 Sup. Ct. 1050.

[9] 1 Winthr. Mil. Law (2d Ed.) 53.

[10] Id. 66.

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military service or subject to the military law.[11] The following persons are subject to their jurisdiction: The officers and men of the army and navy and marine corps, and the militia when in the actual service of the United States, retired officers of the army and navy, and certain classes of civilians who are subject to military discipline only in time of war. The last category includes such persons as sutlers, teamsters, newspaper correspondents, hospital officers and attendants, guides and scouts, and telegraphers.[12] To these must be added officers and soldiers retained by law under military jurisdiction after dismissal or discharge, prisoners under confinement in military prisons undergoing sentences of courts-martial,[13] and drafted men or conscripts who have been lawfully ordered to attend a rendezvous and disobey the summons.[14]

The provision of the fifth amendment that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury" does not apply to the proceedings of courts-martial, because "cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger," are expressly excepted from its operation. But these courts always exhibit to the accused a charge and specifications, in the nature of an indictment. And in accordance with the fundamental principles of justice, he is afforded an opportunity to be heard in his own defense, to summon witnesses, and to be confronted with the witnesses against him.

Within the sphere of their jurisdiction, the judgments and sentences of courts-martial are as final and conclusive as those of civil tribunals of last resort. The sentence of a court-martial, when confirmed, "is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever, unless it shall be in a case in which the court had not jurisdiction over the subject-matter or charge [or the prisoner] or one in which, having jurisdiction over the subject-matter, it has

[11] Wolfe Tone's Case, 27 How. State Tr. 613; Grant v. Gould, 2 H. Bl. 69; Wise v. Withers, 3 Cranch, 331; Ex parte Van Vranken, 47 Fed. 888; Antrim's Case, 5 Phila. 278, Fed. Cas. No. 495; Jones v. Seward, 40 Barb. (N. Y.) 563.

[12] 1 Winthr. Mil. Law (2d Ed.) 112–142.

[13] In re Craig, 70 Fed. 969.

[14] McCall's Case, 5 Phila. (Pa.) 259, Fed. Cas. No. 8,669.

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failed to observe the rules prescribed by the statute for its exercise."[15] A person imprisoned under the sentence of a court-martial may have a writ of habeas corpus to inquire into the validity of the custody in which he is held; but on such a writ the civil court will have no jurisdiction to consider any question except the jurisdiction of the court-martial and the validity of its sentence.[16] But if, in fact, the court-martial proceeded without any jurisdiction, all its actions will be illegal, and not only will the party aggrieved thereby be entitled to recover his liberty upon a writ of habeas corpus, but also it follows that all the parties to the illegal trial are trespassers upon his rights, and he may recover damages from them in a proper suit in a civil court by the verdict of a jury.[17]

Military Commissions.

These quasi-judicial tribunals are to be distinguished from courts-martial. The latter are established only for the government of the military and naval forces, and subsist in time of peace as well as in war. But the former are erected only in actual warfare, or where martial law has been declared, and as an aid to the successful prosecution of belligerent operations or the enforcement of martial law.

JUDICIAL POWER OF THE UNITED STATES.

88. The constitution declares that the judicial power of the United States shall extend to:

(a) All cases in law or equity arising under the constitution or laws of the United States or treaties made under their authority.

(b) All cases affecting ambassadors, other public ministers, and consuls.

(c) All cases of admiralty and maritime jurisdiction.

[15] Dynes v. Hoover, 20 How. 65; In re McVey, 23 Fed. 878; Vanderheyden v. Young, 11 Johns. 150; Mills v. Martin, 19 Johns. 7; Duffield v. Smith, 3 Serg. & R. 590.

[16] In re Esmond, 5 Mackey (D. C.) 64; Johnson v. Sayre, 158 U. S. 109, 15 Sup. Ct. 773; Barrett v. Hopkins, 7 Fed. 312.

[17] Dynes v. Hoover, 20 How. 65; Milligan v. Hovey, 3 Biss. 13, Fed. Cas. No. 9,605.

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(d) Controversies to which the United States shall be a party.

(e) Controversies between two or more states.

(f) Controversies between a state and citizens of another state.

(g) Controversies between citizens of different states.

(h) Controversies between citizens of the same state claiming lands under grants of different states.

(i) Controversies between a state, or the citizens thereof, and foreign states, citizens, or subjects.

General Considerations.

The judicial department of the federal government is invested, by this clause, with powers which are even more extensive than those of the legislative or executive branch. It is clothed with jurisdiction over all controversies which may involve the interpretation of the national constitution or the enforcement of national laws and treaties, thus securing, so far as it rests with the courts, the supremacy of the central government within its proper sphere. And it possesses jurisdiction in all those classes of cases where the intervention of the federal judiciary is necessary or appropriate to insure the peaceful and harmonious relations of the states with each other, and to maintain the rights of citizens of the several states. But further, it was feared that the courts of the states might be influenced to an undue rigor, or unfair discrimination, against citizens of other states or foreigners coming before them as plaintiffs or defendants, and for that reason cases to which such persons should be parties were, for the most part, taken within the sphere of federal cognizance, even though they might not involve the maintenance or application of federal law.

Attention should be paid to the words in which this grant of power is expressed. It is extended to all "cases" of a particular character. Before there can be any proper exercise of the judicial power a "case" must be presented in court for its action. A case implies parties, an assertion of rights, or a wrong to be remedied.[18] It extends to all cases in law or equity. And it is held that with the exception of

[18] Miller, Const. p. 314.

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admiralty, all modes of procedure for the assertion of rights must be arranged under one class or the other, either law or equity. Hence, the terms used include criminal cases, arising under the constitution or laws, as well as civil issues.[19] It will be perceived, in general, that the cases to which the federal judicial power extends may be arranged in two classes. The first includes all cases arising under the constitution or laws or treaties. And here it is the character of the suit which gives jurisdiction, without reference to the character of the parties. The second class includes controversies between states, between a state and citizens of another state, between citizens of different states, and between a state or its citizens and aliens. Here the jurisdiction depends entirely on the character of the parties without reference to the subject of the controversy.[20]

Legislation of Congress.

Although the federal judicial power is defined and granted by the constitution, its provision, in this respect, was not self-executing. That is, the judicial power could not come into practical operation until courts were created by congress and their jurisdiction regulated. The supreme court is a constitutional court, but it was necessary for congress to make provision for its organization and fix the number of judges. All the rest of the judicial power of the United States remained to be dealt with by congress. And in creating the courts, congress was under no obligation to occupy the entire field of judicial power marked out by the constitution. In fact, much of the judicial power which might be made exclusive in the federal courts still remains concurrent in the state courts. The first act of congress directed to the organization of the federal system of courts and the regulation of their jurisdiction was the judiciary act of 1789. One of its authors was Oliver Ellsworth, afterwards chief justice of the United States. It is regarded as a contemporaneous exposition of the nature and extent of the federal judicial power. And though it has often been amended or changed in details, yet the framework of the great system which it established, and all its essential particulars, remain the same. It organized the supreme court, with a chief justice and five asso-

[19] Tennessee v. Davis, 100 U. S. 257.

[20] Cohens v. Virginia, 6 Wheat. 264.

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ciate justices, which number has since been increased to eight. It provided for three judicial circuits and thirteen judicial districts, with courts in each. And it apportioned the federal judicial power among these courts, not, however, filling up the full measure granted by the constitution. For instance, although a case involved a federal question, yet it could not, until 1875, be brought in a federal court unless there was also a diversity of citizenship between the parties.

Jurisdiction of Federal Courts.

As the law now stands, the federal courts have original and exclusive jurisdiction of cases between states or between the United States and a state; cases against ambassadors and consuls; crimes against the United States;[21] cases under the national bankrupt law; cases involving patents and copyrights; suits for penalties and forfeitures under federal laws; all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right to a common-law remedy where the common law is competent to give it; and seizures under the laws of the United States, on land or waters not within the admiralty and maritime jurisdiction.[22] They have original jurisdiction of cases arising under the constitution or laws of the United States or treaties, and also those involving controversies between citizens of different states, provided the amount in controversy exceeds $2,000. If the sum in dispute falls below that amount, the state courts have exclusive jurisdiction, but the decision of the highest state court is liable to be reviewed by the United States supreme court on error, if it is in denial of a right claimed under the constitution or an act of congress. If the amount exceeds $2,000, the federal courts have concurrent jurisdiction with the state courts in both these classes of cases. But if the action is originally brought in the state court, it is liable, under certain conditions to be mentioned hereafter, to be removed into the federal court for trial and determination. The federal judicial power being limited, the federal courts are to be regarded as courts of limited (though not inferior) jurisdiction.

[21] Congress may constitutionally provide that the jurisdiction of prosecutions brought for violations of the laws of the United States shall be exclusive in the federal courts. People v. Fonda, 62 Mich. 401, 29 N. W. 26.

[22] Rev. St. U. S. § 711.

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Federal Questions.

The importance of confiding to the federal courts the ultimate decision of all questions arising under the constitution or laws of the United States or treaties is easily seen. The orderly and successful working of government, or even its very existence, depends upon a fixed and harmonious interpretation of the organic law and the statutes passed in pursuance of it. But the grant of jurisdiction to the federal courts over controversies involving federal questions does not deprive the state courts of the right to construe and apply the federal constitution or acts of congress whenever they are properly involved in the cases before them. But the decisions of the federal courts on these questions are authoritative.

A case arises under the constitution, not merely where a party comes into court to demand something conferred upon him by the constitution, a law of the United States, or a treaty, but wherever its correct decision as to the right, privilege, claim, protection, or defense of a party, in whole or in part, depends upon a correct construction of either.[23] It is no objection to the jurisdiction of the federal court that questions are involved which are not all of a federal character. If one of the latter exists in the case, if there be a single such ingredient in the mass, it is sufficient.[24] And where the subject-matter of the suit confers jurisdiction on the federal courts, by reason of the case arising under the federal constitution or laws, the citizenship of the parties is entirely immaterial.[25] But it is not enough to confer jurisdiction that a federal question may arise in the case; it must actually arise and be necessary to the determination of the controversy.[26] A suit cannot be said to be one arising under the constitution or laws of the United States until it has been made to appear in some way on the face of the record that some title, right, privilege, or immunity, on which the recovery depends will be defeated by one construction of the constitution or laws or sustained by an

[23] Tennessee v. Davis, 100 U. S. 257; New Orleans, M. & C. R. Co. v. Mississippi, 102 U. S. 135.

[24] Mayor v. Cooper, 6 Wall. 247.

[25] Wilder v. Bank, 9 Biss. 178, Fed. Cas. No. 17,651; Fischer v. Neil, 6 Fed. 89; Sawyer v. Parish of Concordia, 12 Fed. 754; Lawrence v. Norton, 18 Fed. 1; Norfolk Trust Co. v. Marye, 25 Fed. 654.

[26] Bolling v. Lersner, 91 U. S. 594; Kansas Endowment Ass'n v. Kansas, 120 U. S. 103, 7 Sup. Ct. 490.

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opposite construction.[27] And when any question arising under the laws of the United States has been once clearly and unequivocally adjudicated by the supreme court, it is no longer a proposition for judicial inquiry by the inferior federal courts. No issue growing out of any statute which has once been so adjudicated can be said to involve in its determination the construction of such statute.[28]

Under this grant of power, the federal courts may be invested with jurisdiction of all controversies to which federal corporations are parties, because all such cases may be said to arise under the laws of the United States.[29] So, where the question at issue is whether a state constitution, statute, or ordinance, relied on and affecting the rights of the parties, does or does not impair the obligation of contracts, this is such a federal question as will authorize the removal of the suit into a federal court.[30] But the mere fact that the suit is brought upon a judgment recovered in a federal court does not make it one arising under the constitution or laws of the United States, unless some question is raised distinctly involving the federal constitution or statutes.[31]

Cases Arising under Treaties.

As the federal government is the only power in this country which can make treaties, it is proper and necessary that the jurisdiction to construe them and determine their scope and effect should be confided alone to the national authorities. A treaty is primarily a compact between independent nations, and in that aspect of it the courts have nothing to do with its observance. But it is also the supreme law of the land, and it may become the foundation of private rights, and when that is the case, it becomes a proper subject of judicial inquiry and action.[32]

[27] Ames v. Kansas, 111 U. S. 449, 4 Sup. Ct. 437; Starin v. City of New York, 115 U. S. 248, 6 Sup. Ct. 28; Germania Ins. Co. v. Wisconsin, 119 U. S. 473, 7 Sup. Ct. 260.

[28] Inez Min. Co. v. Kinney, 46 Fed. 832; Blue Bird Min. Co. v. Largey, 49 Fed. 289.

[29] Osborn v. Bank of U. S., 9 Wheat. 738.

[30] Murray v. Charleston, 96 U. S. 432; People v. Illinois Cent. R. Co., 16 Fed. 881.

[31] Provident Sav. Life Assur. Soc. v. Ford, 114 U. S. 635, 5 Sup. Ct. 1104.

[32] Head Money Cases, 112 U. S. 580, 598, 5 Sup. Ct. 247; Hauenstein v. Lynham, 100 U. S. 483.

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Cases Affecting Ambassadors.

Since the privileges of diplomatic agents are accorded to them as to their sovereigns or governments, and not for their personal advantage, it is proper that the courts of the government to which they are accredited, and with which alone they can have official dealings, should have exclusive cognizance of suits in which they are parties.[33] Accordingly the constitution extends the judicial power of the United States to cases affecting ambassadors, other public ministers, and consuls. And congress, at an early day, enacted that the supreme court "shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations; and original, but not exclusive, jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul or vice-consul is a party."[34] As an ambassador stands in the place of his sovereign, he is not subject to the municipal laws of the state to which he is accredited. And as immunity from all accountability to such laws is necessary to enable him to exercise his diplomatic functions freely, he can neither be sued in the civil courts nor arrested and tried for any breach of the criminal laws. This is a rule of international law to which there are very few exceptions, if any. The misconduct of a minister can be redressed only by international negotiation, and if he is to be punished, it can be done only by his own country. But a minister may consent to the prosecution of civil proceedings against him. And the courts are open to him if he desires to seek redress for injuries committed against him. The official character of an ambassador or minister is proved by a certificate from the secretary of state. This will be accepted by the courts as sufficient, and if it is produced, they will not go into collateral or argumentative proof.[35] An indictment for violating the law of nations by offering violence to the person of a foreign minister is not a case affecting ambassadors, within the meaning of the constitution.[36]

[33] Davis v. Packard, 7 Pet. 276.
[34] Rev. St. U. S. § 687.
[35] In re Baiz, 135 U. S. 403, 10 Sup. Ct. 854.
[36] U. S. v. Ortega, 11 Wheat. 467.

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Admiralty and Maritime Cases.

The court of admiralty was originally so called because it was held by the Lord High Admiral of England. Its jurisdiction extended to causes of action (principally criminal) arising on the high seas or on the coasts or in ports and harbors, but not within the body of any county. If the matter occurred "infra corpus comitatus," it was subject to the jurisdiction of the ordinary civil courts, not that of the admiral. But in respect to the territorial limits of this jurisdiction, the United States has departed from the English rule. At first, and for some years, "there was a diversity of opinion between the courts of the United States as to whether the extent of the jurisdiction conferred by the constitution 'to all cases of admiralty and maritime jurisdiction' was to be limited; one party contending that it was to be interpreted by what were cases of admiralty jurisdiction in England when the constitution was adopted, and the other party contending that it was to be as broad as the jurisdiction conferred upon the admiralty courts as they existed in the colonies and states prior to the adoption of the constitution. The extent and exact nature of this jurisdiction were well known to the authors of the constitution when that instrument was framed. There had been important controversies between the states as to the extent and nature of the jurisdiction of their respective admiralty courts; and the want of an harmonious and uniform system of administering the admiralty laws was greatly felt, and one of the chief arguments in favor of the adoption of our present constitution. The inability of the confederation preceding our present Union of states to reconcile these conflicts in the jurisdictions of the several states had been made so apparent by one or two cases which attracted the attention of all the people of the different states that it was the purpose of the authors of the constitution to vest in the federal courts of the new government ample power to cure all these notorious conceded defects." [87] In some of the early cases, it was held that the admiralty courts had no jurisdiction over a vessel which was engaged exclusively in the navigation of the Mississippi river and its tributary streams.[88] But

[87] The City of Toledo, 73 Fed. 220.

[88] The Orleans v. Phœbus, 11 Pet. 175; The Thomas Jefferson, 10 Wheat. 428.

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in the case of Waring v. Clarke,[39] the cause of action arose out of a collision on the Mississippi river ninety miles above New Orleans, but within the ebb and flow of the tide. And it was held that this clause of the constitution was neither limited to, nor to be interpreted by, what were cases of admiralty jurisdiction in England when the constitution was adopted, and that in cases of tort or collision as far up a river as the tide ebbs and flows, the admiralty courts have jurisdiction, although the place may not be on the high seas, but within the body of a county. And by an act of 1845, congress extended the jurisdiction to the Great Lakes. And the supreme court has entirely repudiated the doctrine that "navigable waters" are such only as are affected by the tide, substituting the rule, as better adapted to the circumstances of our country, that waters navigable in fact are navigable in law. Thus the admiralty jurisdiction was extended to all public navigable lakes, rivers, and waterways which are used, or may be used, as highways for commerce to be carried on between states or with foreign nations.[40] But where a damage done is done wholly upon land, the fact that the cause of the damage originated on water subject to the admiralty jurisdiction does not make the case one for the admiralty.[41] And although the admiralty jurisdiction of the United States may extend within the boundaries of a state, following the course of a navigable river or lake, yet it does not deprive the state of all jurisdiction over the territory covered by such navigable water, but only of such portion of its jurisdiction as relates to admiralty or maritime causes. Hence if a crime against the laws of the state is committed on such waters, within the limits of the state, the jurisdiction to try and punish it belongs to the state and not to the federal admiralty court.[42]

The federal admiralty courts may take jurisdiction over foreign vessels, and their officers and crews, in the ports of the United States, but are not obliged to do so, and may exercise a discretion in such cases. "For circumstances often exist which render it inexpedient for the court to take jurisdiction of controversies between foreigners in cases not arising in the country of the forum; as, where they are

[39] 5 How. 441.

[40] The Genesee Chief, 12 How. 443.

[41] The Plymouth, 3 Wall. 20.

[42] Scott v. The Young America, Newb. 101, Fed. Cas. No. 12,549.

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governed by the laws of the country to which the parties belong and there is no difficulty in a resort to its courts, or where they have agreed to resort to no other tribunals. The cases of foreign seamen suing for wages, or because of ill-treatment, are often in this category, and the consent of their consul or minister is often required before the court will proceed to entertain jurisdiction. But where the voyage is ended, or the seamen have been dismissed or treated with great cruelty, it will entertain jurisdiction even against the protest of the consul. But although the courts will use a discretion about assuming jurisdiction of controversies between foreigners in cases arising beyond the territorial jurisdiction of the country to which the courts belong, yet where such controversies are communis juris, that is, where they arise under the common law of nations, special grounds should appear to induce the court to deny its aid to a foreign suitor when it has jurisdiction of the ship or party charged."[43] But no suit in rem in admiralty can be sustained, or seizure made by the marshal, under process against property of the United States or of a foreign government, the same being employed in or devoted to the public service and in the possession of officers of the government.[44]

It should here be noted that the admiralty jurisdiction is an entirely distinct and separate thing from the power of congress to regulate commerce. Neither depends at all upon the other. Where the admiralty jurisdiction is invoked, it is the nature of the cause of action and the place where it arose which must govern, and not the character of the commerce in which the vessel may be engaged. Thus, for instance, the case of a collision between two ships on a navigable river or one of the Great Lakes is within the admiralty jurisdiction, notwithstanding the vessels were trading between ports of the same state and engaged wholly in internal commerce.[45] So also, in respect to the nature of the action, cases of admiralty and maritime jurisdiction are not defined by the constitution, nor do they depend upon it, nor "arise under it." They are determined by the ancient and settled rules of the admiralty jurisdiction, but are not limited either by the statutes or the judicial deci-

[43] The Belgenland, 114 U. S. 355, 5 Sup. Ct. 860; The Carolina, 14 Fed. 424.
[44] Long v. The Tampico, 16 Fed. 491.
[45] The Commerce, 1 Black, 574.

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sions of England.[46] Although the cause of action may be created by a state statute, and unknown to the ancient admiralty law, (as, liens on vessels for certain kinds of supplies or materials,) yet if it is properly of a maritime nature, the federal courts, sitting in admiralty, will take cognizance of it and enforce it.[47]

The principal subjects of admiralty jurisdiction may be arranged under two heads, viz., those arising out of maritime torts, and those arising out of maritime contracts. In cases of the former class, the jurisdiction depends upon locality. That is, the cause of action must be in the nature of a tort, of civil cognizance, and it must have arisen on waters subject to the admiralty. In cases of the latter class, the jurisdiction does not depend at all upon locality, but upon the nature of the contract. That is, the admiralty courts will have jurisdiction if the cause of action is founded on a contract which is of a maritime nature and relates to maritime business, no matter where it may have been made.[48] The classes of maritime contracts are numerous. Thus, a policy of marine insurance is a maritime contract and therefore of admiralty jurisdiction.[49] So, also, says Judge Story in the case cited, are "charter parties, affreightments, marine hypothecations, contracts for maritime service in the building, repairing, and navigating ships, contracts between part owners of ships, contracts respecting averages, contributions, and jettisons." It is well settled that a charter party is a maritime contract,[50] and the same is true of an agreement of consortship between the masters of two vessels engaged in the business of salving.[51] Claims for pilotage fees are within the jurisdiction of the admiralty,[52] and of course claims by seamen for wages, and also a claim by shipwrights for work done and material found in the repair of a vessel employed in plying on navigable waters.[53] Again, a bottomry bond is a maritime contract of which admiralty has jurisdiction.[54] But an ordinary mortgage

[46] New England Mut. Marine Ins. Co. v. Dunham, 11 Wall. 1.
[47] Ex parte McNiel, 13 Wall. 236; The Lottawanna, 21 Wall. 558.
[48] The Belfast, 7 Wall. 624.
[49] De Lovio v. Bolt, 2 Gall. 398, Fed. Cas. No. 8,776.
[50] The Fifeshire, 11 Fed. 743.
[51] Andrews v. Wall, 8 How. 568.
[52] Ex parte Hagar, 104 U. S. 520.
[53] Peyroux v. Howard, 7 Pet. 324.
[54] The Draco, 2 Sumn. 157, Fed. Cas. No. 4,057.

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of a ship, not made with any special reference to navigation or the perils of the sea, is not a maritime contract.[55]

The constitution does not declare that the jurisdiction of the federal courts in admiralty and maritime cases shall be exclusive. But by an act of congress it is provided that the district courts of the United States shall have jurisdiction "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it, and of all seizures on land and on waters not within admiralty and maritime jurisdiction. And such jurisdiction shall be exclusive, except in the particular cases where jurisdiction of such causes and seizures is given to the circuit courts; and shall have original and exclusive cognizance of all prizes brought into the United States."[56] Of this statute it has been said: "Examined carefully, it is evident that congress intended by that provision to allow the party to seek redress in the admiralty if he saw fit to do so, but not to make it compulsory in any case where the common law is competent to give him a remedy."[57] State statutes which attempt to confer upon state courts a remedy for marine torts and marine contracts by proceedings strictly in rem are void, because in conflict with this act of congress. These statutes do not come within the saving clause concerning common-law remedies. But this rule does not prevent the seizure and sale by the state courts of the interest of any owner in a vessel, by execution or attachment, when the proceeding is a personal one against such owner, to recover a debt for which he is personally liable. Nor does it prevent any action which the common law gives for obtaining a judgment in personam against a party liable on a marine contract or tort.[58] The federal courts have not exclusive jurisdiction of suits in personam growing out of collisions between vessels while navigating a river; for the right to a common-law remedy is expressly saved to suitors, and "that there has always been a remedy at common law for damages by collision at sea cannot be denied."[59] A state statute may create mari-

[55] Bogart v. The John Jay, 17 How. 399.
[56] Rev. St. U. S. §§ 563, 711.
[57] American S. S. Co. v. Chase, 16 Wall. 522.
[58] The Hine v. Trevor, 4 Wall. 555.
[59] Schoonmaker v. Gilmore, 102 U. S. 118.

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time liens in favor of persons who did not before possess such liens, but cannot authorize their enforcement by proceedings in rem in the state courts; that, however, does not prevent their enforcement in the admiralty courts.[60]

Aliens.

The federal jurisdiction attaches to a case where one of the parties is a foreign state or one of its subjects or citizens and the other is a state of the Union or one of its citizens. Where both parties are aliens the federal courts have no jurisdiction.[61] An Indian residing within the United States is not a "foreign citizen or subject" within the meaning of the constitution, and cannot on that ground maintain a suit in the federal courts.[62] But a corporation existing under the laws of a foreign country is deemed an alien within the meaning of this clause; that is, it is presumed to be made up of corporators who are citizens or subjects of the government which chartered it.[63] An alien continues to be a "citizen or subject of a foreign state" until he has been fully naturalized under the laws of the United States. The fact that he has made his preliminary declaration of intention to apply for naturalization will not deprive him of the right to sue and be sued in the federal courts; nor will the fact that the state in which he resides has given him the right to vote or such other attributes of citizenship as lie within the gift of the state.[64] Suits may be maintained in the federal courts only by "alien friends", that is, citizens or subjects of a foreign nation with which our own country is at peace. It is not according to the rules of international law to open the courts to alien enemies.

Suits Between Citizens of Different States.

The reason for giving to the federal courts jurisdiction of controversies between citizens of different states was the apprehension that a citizen sued in the courts of his own state by a non-resident might be able to prevail unjustly, in consequence of his local influ-

[60] The Menominie, 36 Fed. 197.
[61] Montalet v. Murray, 4 Cranch, 46.
[62] Karrahoo v. Adams, 1 Dill. 344.
[63] Society for the Propagation of the Gospel v. New Haven, 8 Wheat. 464.
[64] Minneapolis v. Reum, 6 C. C. A. 31, 56 Fed. 576.

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ence, or the prejudice against citizens of other states, or state pride and jealousy. This has proved to be the largest source of federal jurisdiction. Cases between citizens of different states very far outnumber all other classes of actions in the circuit courts. "Citizenship" and "domicile" are considered as equivalent, for the purpose of this provision of the constitution, inasmuch as the causes which led to its introduction depend on the fact of residence in different states, and have nothing to do with the political aspects of citizenship.[65]

A citizen of the District of Columbia, or of one of the territories, not being a "citizen of a state," cannot maintain a suit in the federal courts against a citizen of a state.[66] But it is now well settled that for all purposes of federal jurisdiction a corporation is conclusively considered to be a citizen of the state which created it, and no averment or proof as to citizenship of its members elsewhere, offered with a view to withdrawing the cause from the cognizance of the federal court, is admissible or material.[67] This, however, does not prevent the corporation from suing, or being sued by, one of its stockholders, as such, who resides in another state.[68] And a corporation created by the laws of one state, although consolidated with another of the same name in another state, under the authority of a statute of each state, is nevertheless, in the former state, a corporation existing under the laws of that state alone.[69] In order to confer jurisdiction on the federal courts in this class of cases, the requisite diversity of citizenship between the parties must appear on the face of the record.[70]

[65] Gassies v. Ballon, 6 Pet. 761; Shelton v. Tiffin, 6 How. 163.

[66] Hepburn v. Ellzey, 2 Cranch, 445; Sere v. Pitot, 6 Cranch, 332; New Orleans v. Winter, 1 Wheat. 91; Barney v. Baltimore, 6 Wall. 280; Scott v. Jones, 5 How. 343; Cissel v. McDonald, 16 Blatchf. 150, Fed. Cas. No. 2,729; Watson v. Brooks, 13 Fed. 540.

[67] Louisville, C. & C. R. Co. v. Letson, 2 How. 497; Whitton v. Railway Co., 13 Wall. 270; Steamship Co. v. Tugman, 106 U. S. 118, 1 Sup. Ct. 58; Shaw v. Quincy Min. Co., 145 U. S. 444, 12 Sup. Ct. 935; Bank of U. S. v. Devaux, 5 Cranch, 61.

[68] Dodge v. Woolsey, 18 How. 331.

[69] Muller v. Dows, 94 U. S. 444.

[70] Bingham v. Cabot, 3 Dall. 382; Jackson v. Ashton, 8 Pet. 148; Bailey v. Dozier, 6 How. 23.

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Land Grants of Different States.

The federal jurisdiction in this class of cases depends partly upon the citizenship of the parties and partly upon the character of the particular issue. "It was supposed that where there were grants under the authority of different states, there would be controversies. This provision was therefore introduced here for the purpose of giving the federal courts jurisdiction of that class of cases." [71] Some few cases have heretofore been brought in the courts of the United States under this provision.[72]

UNITED STATES AS A PARTY.

89. The United States, being a sovereign and independent nation, is not liable to be made defendant in any suit or proceeding without its own consent, either in one of its own courts or in the courts of a state.[73] But it may, as plaintiff, institute proceedings against an individual or a state in any proper court.

There is one apparent exception to the immunity of the United States against suits. That is the case of proceedings to appropriate property to public use under the power of eminent domain. It is admitted that land within a particular state, purchased and held by the United States as a mere proprietor, and not appropriated to or de-

[71] Miller, Const. 334.

[72] See Town of Pawlet v. Clark, 9 Cranch, 292; Colson v. Lewis, 2 Wheat. 377.

[73] No suit can be maintained against the United States, or against its property, without express authority of congress; and the United States has never consented to be sued in the courts of a state in any case. No officer of the executive department has authority to waive the exemption of the United States from suit. Stanley v. Schwalby, 162 U. S. 255, 16 Sup. Ct. 754. But the exemption of the United States from suits is limited to suits against the government directly and by name, and cannot successfully be pleaded in favor of officers and agents of the United States when sued by private persons for property in their possession as such officers and agents. In such cases, a court of competent jurisdiction over the parties before it may inquire into the lawfulness of the possession of the United States, as held by such officers and agents, and give judgment according to the result of that inquiry. U. S. v. Lee, 106 U. S. 196, 1 Sup. Ct. 240.

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signed for any specific use pertaining to the functions of the national government, may be condemned and appropriated for streets, highways, or other public purposes; and this implies some sort of judicial proceedings to ascertain and foreclose the interest of the United States.[74] And since, in the administration of government, many claims accrue to individuals against the United States which ought, in justice and fairness, to be submitted to the examination of a judicial tribunal and enforced if found to be valid and legal, the government has established a court for this purpose, called the "Court of Claims." Various acts of congress have referred claims to the arbitrament of this tribunal or specified the classes of actions which may be brought in it. It may give judgment against the United States if it finds the legal right to be with the claimant. But there is no way of enforcing its judgments, since no constraint can be put upon the United States. In practice, however, congress, sooner or later, always appropriates money to pay such judgments.

As a plaintiff, the United States may institute and maintain a suit either in one of its own courts, or in the courts of a state, or in those of a foreign nation, according to the nature of the cause of action and the circumstances which determine the selection of a forum.[75] It brings many suits in the inferior federal courts, not only criminal actions against individuals, but suits to recover property, taxes, penalties, and the like. The United States may sue one of the states, and the proper forum for such a proceeding is the supreme court, which has original jurisdiction of it.[76] But in all other cases the government may choose its own forum, unless restricted by an act of congress.

STATES AS PARTIES.

90. Since the adoption of the eleventh amendment, a state of the Union cannot be sued by any private person. But one state may sue another state, and a state, as plain-

[74] U. S. v. Chicago, 7 How. 185; Union Pac. Ry. Co. v. Burlington & M. R. R. Co., 8 Fed. 106; Northern Pac. R. Co. v. St. Paul, M. & M. Ry. Co., Id. 702.

[75] U. S. v. Wagner, L. R. 2 Ch. App. 582; Queen of Portugal v. Glyn, 7 Clark & F. 466.

[76] U. S. v. North Carolina, 136 U. S. 211, 10 Sup. Ct. 920; U. S. v. Texas, 143 U. S. 621, 12 Sup. Ct. 488.

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tiff, may institute proceedings against an individual, and in these cases the supreme court of the United States has original jurisdiction.

States as Defendants.

In the case of Chisholm v. Georgia,[77] it was ruled that, under the language of the constitution and of the judiciary act of 1789, a state of the Union was liable to be sued in the federal courts, against its will, by a citizen of another state or an alien. This decision occasioned so much surprise, excitement, and apprehension, that at the first meeting of congress after its promulgation the eleventh amendment was proposed, and was in due course adopted. This amendment actually reversed the decision of the supreme court. It provides that "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state." Long after the date of the amendment, the question was raised whether a state could be sued in a federal court by one of its own citizens, upon a suggestion that the case was one arising under the constitution or laws of the United States. It was ingeniously argued that, under the language of the constitution, a case so arising is within the federal jurisdiction without any regard to the character of the parties; that a state is not exempted under this clause; and that the eleventh amendment does not deny the jurisdiction of the federal courts in cases where a state is sued by one of its own citizens. But the court refused to accede to the reasoning, and held that the suit would not lie.[78] At the present time, therefore, the rule is that a state cannot be sued by any private person, whether it be one of its own citizens, or a citizen of another state, or an alien.[79] But there are still certain cases in which a state may be made a defendant

[77] 2 Dall. 419.

[78] Hans v. Louisiana, 134 U. S. 1, 10 Sup. Ct. 504.

[79] It is now entirely customary for a state to make provision for the maintenance of suits against it by private persons in its own courts. But an act of the legislature authorizing a party to sue the state does not authorize the issuance of a writ of fieri facias, commanding the seizure and sale of property of the state to satisfy the judgment rendered in such suit. The only effect of such a judgment is to effect a settlement of disputed questions of fact

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without its consent. It may be sued by the United States,[80] by another state, and probably also by a foreign prince or government.

To bring a case within the eleventh amendment, it is not necessary that the state should be formally or nominally a party to the suit; it is enough if the state, though not made a party to the record, is the real party in interest.[81] But this amendment does not operate to prevent counties in a state from being sued in the federal courts.[82] And "the immunity from suit belonging to a state, which is respected and protected by the constitution within the limits of the judicial power of the United States, is a personal privilege, which it may waive at pleasure; so that in a suit, otherwise well brought, in which a state had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction; while, of course, those courts are always open to it as a suitor in controversies between it and citizens of other states." [83]

Questions frequently arise as to the effect of the eleventh amendment, in actions against state officers, wherein it is alleged that a law of the state has assumed to violate the obligation of its contracts. The rule is thus settled: If the suit is brought against the officers of the state as representing the state's action or liability, or demands affirmative official action on the part of the defendants to secure the performance of an obligation which belongs to the state in its political capacity, the effect is to make the state itself a real party, against which the judgment will so operate as to compel it to perform its contracts, and the suit is not maintainable. But if the suit is brought against defendants who, claiming to act as officers of the state, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state, and thus make themselves trespassers and personally liable, in that case, whether the suit is brought to recover money or property, or for

and law involved, morally binding on the state, but possessing no executory force. Carter v. State, 42 La. Ann. 927, 8 South. 836.

[80] U. S. v. North Carolina, 136 U. S. 211, 10 Sup. Ct. 920.

[81] Poindexter v. Greenhow, 114 U. S. 270, 5 Sup. Ct. 903, 962.

[82] Lincoln Co. v. Luning, 133 U. S. 529, 10 Sup. Ct. 363.

[83] Clark v. Barnard, 108 U. S. 436, 2 Sup. Ct. 878.

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damages, or for injunction or mandamus, it is not, within the meaning of the eleventh amendment, an action against the state.[84] A suit against railroad commissioners of a state, to restrain enforcement of their rates and regulations, as unjust and unreasonable, the state having no direct pecuniary interest therein, is not a suit against the state within the meaning of the amendment.[85] And so, where a statute of a state exempts certain property from taxation, a suit brought against state and county officers, to restrain them from assessing such property, is not in name or effect a suit against the state, but is maintainable in the federal courts.[86] And the fact that a state is a stockholder in a private corporation does not deprive the courts of jurisdiction of suits against such corporation.[87] The eleventh amendment, it is held, does not restrict or take away the appellate jurisdiction of the supreme court in cases where a controversy arises under the constitution or laws of the United States, although a state may be a party to such controversy. And a writ of error will lie in such cases, although a state, having commenced the suit in its own courts, will thus become a defendant in error in the appellate court.[88]

Suits Between States.

The reason for giving the supreme court original jurisdiction of controversies between two or more states was partly the consideration that such a jurisdiction was necessary to maintain the peace-

[84] Pennoyer v. McConnaughy, 140 U. S. 1, 11 Sup. Ct. 699; In re Ayers, 123 U. S. 443, 8 Sup. Ct. 164; Hagood v. Southern, 117 U. S. 52, 6 Sup. Ct. 608; Osborn v. Bank of U. S., 9 Wheat. 738; Antoni v. Greenhow, 107 U. S. 769, 2 Sup. Ct. 91; Davis v. Gray, 16 Wall. 203; Board of Liquidation v. McComb, 92 U. S. 531; Poindexter v. Greenhow, 114 U. S. 270, 5 Sup. Ct. 903, 962; Louisiana v. Jumel, 107 U. S. 711, 2 Sup. Ct. 128; Cunningham v. Macon & B. R. Co., 109 U. S. 446, 3 Sup. Ct. 292, 609; U. S. v. Lee, 106 U. S. 196, 1 Sup. Ct. 240.

[85] Reagan v. Trust Co., 154 U. S. 388, 14 Sup. Ct. 1047. And see Piek v. Railway Co., 6 Biss. 177, Fed. Cas. No. 11,138; Clyde v. Railroad Co., 57 Fed. 486.

[86] In re Tyler, 149 U. S. 164, 13 Sup. Ct. 785; Secor v. Singleton, 35 Fed. 376; Sanford v. Gregg, 58 Fed. 620.

[87] Bank of U. S. v. Planters' Bank, 9 Wheat. 904; President, etc., of Bank of Kentucky v. Wister, 2 Pet. 318; Darrington v. Bank, 13 How. 12.

[88] Cohens v. Virginia, 6 Wheat. 264.

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ful and harmonious relations of the states in the Union, and partly in order to secure the dignity of the states themselves, which might justly have been deemed compromised if the settlement of their disputes had been intrusted to any other or inferior authority. Before the constitution there was no court in which one state could sue another. In fact, while history furnishes some few illustrations of a central authority invested with power to hear controversies between quasi-independent powers, and to arbitrate between them, there is no exact historical parallel for this provision of the constitution, which erects the supreme federal tribunal not merely into an arbitrator but a judge between states, invested with full jurisdiction and with power to command obedience to its decisions. That court "can not only hear and determine all controversies between different states, of which it is given original jurisdiction, but can also bring them before it by process, as it can bring the humblest citizen, and declare its judgment, which it has usually been able to enforce." [88] But in order to call into exercise this jurisdiction of the supreme court, it is necessary that states, as such, should be actually parties in interest in the controversy, and not merely nominal parties.[89] Very few cases between states have been brought in the supreme court, except in regard to the settlement of disputed boundaries. "At the time of the adoption of the constitution, there existed controversies between eleven states in respect to boundaries, which had continued from the first settlement of the colonies. The necessity for the creation of some tribunal for the settlement of these and like controversies that might arise, under the new government to be formed, must, therefore, have been perceived by the framers of the constitution; and consequently, among the controversies to which the judicial power of the United States was extended by the constitution, we find those between two or more states. And that a controversy between two or more states, in respect to boundary, is one to which, under the constitution, such judicial power extends, is no longer an open question in this court." [91]

[88] Miller, Const. p. 330.

[89] Fowler v. Lindsey, 3 Dall. 411; New Hampshire v. Louisiana, 108 U. S. 76, 2 Sup. Ct. 176.

[91] See Rhode Island v. Massachusetts, 12 Pet. 657; New Jersey v. New York, 5 Pet. 284; Missouri v. Iowa, 7 How. 660; Florida v. Georgia, 17 How.

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When process at common law or in equity is to issue from the United States supreme court against a state, it must be served upon the governor or chief executive magistrate of the state and also upon the attorney general of the state; service upon one of them alone is not sufficient.[92] When the controversy is between two states, the court will not apply the rules which ordinarily govern courts of equity as to the allowance of time for filing an answer and other such proceedings, because the parties in such a controversy must, in the nature of things, be incapable of acting with the promptness of an individual.[93] And the practice is well settled that, in suits against a state, if the state shall refuse or neglect to appear, upon due service of process, no coercive measures will be taken to compel an appearance, but the plaintiff state will be allowed to proceed ex parte.[94]

States as Plaintiffs.

The supreme court has original jurisdiction of suits brought by a state against citizens of another state, as well as of controversies between two states. That is to say, a state may sue an individual, being a citizen of another state, in the supreme court, as well as another state.[95] A suit by or against the governor of a state, as such, in his official character, is a suit by or against the state.[96]

JURISDICTION OF SUPREME COURT.

91. The constitution provides that the supreme court of the United States shall have original jurisdiction

(a) In all cases affecting ambassadors, other public ministers, and consuls.

(b) In cases in which a state shall be a party.

478; Alabama v. Georgia, 23 How. 505; Virginia v. West Virginia, 11 Wall. 39; Missouri v. Kentucky, Id. 395; Indiana v. Kentucky, 136 U. S. 479, 10 Sup. Ct. 1051; Nebraska v. Iowa, 143 U. S. 359, 12 Sup. Ct. 396.

[92] New Jersey v. New York, 5 Pet. 284; Grayson v. Virginia, 3 Dall. 320; Huger v. South Carolina, Id. 339.

[93] Rhode Island v. Massachusetts, 13 Pet. 23.

[94] Massachusetts v. Rhode Island, 12 Pet. 755.

[95] Wisconsin v. Insurance Co., 127 U. S. 265, 8 Sup. Ct. 1370.

[96] Kentucky v. Dennison, 24 How. 66; Governor of Georgia v. Madrazo, 1 Pet. 110.

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92. In all other cases to which the judicial power of the United States extends, the supreme court may have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as congress may prescribe.

Original Jurisdiction.

The provision of the constitution with reference to the original jurisdiction of the supreme court is both a grant and a limitation. On the one hand, it confers jurisdiction which cannot be taken away or abridged by any act of the legislative department. On the other hand, it precludes congress from conferring on the court, or the court itself from assuming, any original jurisdiction in cases other than those specified. But the jurisdiction thus conferred by the constitution is not in terms made exclusive. Consequently it is not incompetent for congress to invest the lower federal courts with a like original jurisdiction, concurrent with that of the supreme court. Statutory regulations with regard to this branch of the court's jurisdiction have been made as follows: "The supreme court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens, in which case it shall have original but not exclusive jurisdiction. And it shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations; and original but not exclusive jurisdiction of all suits brought by ambassadors or other public ministers, or in which a consul or vice-consul is a party." And again: "The supreme court shall have power to issue writs of prohibition in the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a state, or an ambassador or other public minister, or a consul or vice-consul is a party." Also: "The supreme court and the circuit and district courts shall have power to issue writs of habeas corpus." [97]

[97] Rev. St. U. S. §§ 687, 688, 751.

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But these various writs, while they may issue from the supreme court in aid of its appellate jurisdiction, cannot be used as original process save in the cases where original jurisdiction is given by the constitution. Thus, the court has power to issue a mandamus to a circuit court commanding that court to sign a bill of exceptions in a case tried before such court,[98] but not to an officer of the executive department requiring affirmative action on his part.[99] Nor can a writ of prohibition issue from the supreme court in cases where there is no appellate power given by law nor any special authority to issue the writ; neither a writ of error, writ of prohibition, nor certiorari will lie from the supreme court to a circuit court in a criminal case.[100]

The original jurisdiction of the supreme court has chiefly been resorted to in controversies between two states, as in the case of boundary disputes, as mentioned on a preceding page. It is also held that the court has original jurisdiction of a suit in equity brought by the United States against a state to determine the boundary between the state and a territory of the United States, and that such a question is susceptible of judicial determination.[101]

Appellate Jurisdiction.

The constitutional provision respecting the appellate jurisdiction of the supreme court is not self-executing. No appellate jurisdiction could be exercised without a grant of it by congress. And the appellate jurisdiction may be regulated, enlarged, or restricted, as congress shall see fit.[102] Since the creation of the circuit courts of appeals, and the vesting in them of considerable appellate jurisdiction, the supreme court has jurisdiction of appeals from the circuit or district courts only in the following cases: Where the jurisdiction of the court is in issue; from final sentences and decrees in prize cases; in cases of conviction of a capital or otherwise infamous crime; in cases involving the construction or application of the constitution of the United States; in cases involving the constitutionality of an act of congress or a treaty; cases in which the constitution or a

[98] Ex parte Crane, 5 Pet. 190.

[99] Marbury v. Madison, 1 Cranch, 137.

[100] Ex parte Gordon, 1 Black, 503.

[101] U. S. v. Texas, 143 U. S. 621, 12 Sup. Ct. 488.

[102] Barry v. Mercein, 5 How. 103, 119; Ex parte McCardle, 7 Wall. 506, 513.

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law of a state is claimed to be in contravention of the constitution of the United States. In all other cases the appellate jurisdiction is in the circuit courts of appeals. But the most important feature of the appellate jurisdiction of the supreme court (at least from the point of view of constitutional law) is that which gives it power to review the judgments of the highest courts of the states in certain cases. The judiciary act of 1789 provided that "a final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party, under such constitution, treaty, statute, commission, or authority, may be re-examined, and reversed or affirmed, in the supreme court on a writ of error." [103] The constitutionality of this act has been fully vindicated.[104] But the supreme court holds itself strictly within the limits of the jurisdiction here laid down. It will not take jurisdiction to review a case thus brought to it merely on the ground that a federal question might have formed the basis of decision of the case; it must appear that such a question actually did arise in the case and form the ground of the judgment of the state court, adverse to the plaintiff in error. When the state court, in rendering judgment, decides a federal question, and also decides against the plaintiff in error upon an independent ground, not involving a federal question, and broad enough to support the judgment, the writ of error will be dismissed by the United States supreme court without considering the federal question.[105] Even where it does not appear upon what ground the state court placed its judgment, if the

[103] Rev. St. U. S. § 709; Judiciary Act, § 25.

[104] Martin v. Hunter's Lessee, 1 Wheat. 304.

[105] Bacon v. Texas, 163 U. S. 207, 16 Sup. Ct. 1023; Beaupre v. Noyes, 138

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judgment may be supported without deciding a federal question, the federal court will have no jurisdiction to review the case.[106] But if the adjudication of a federal question is necessarily involved in the disposition of a case by the state court, it is not necessary that it should appear affirmatively in the record, or in the opinion of the court, that such a question was raised and decided.[107] And the court will confine its review of the judgment of the state court to the questions arising under the federal constitution or laws.[108] In order to be appealable, the judgment or decree must have been rendered by the highest court of the state "in which a decision in the suit could be had," that is, the court of last resort for that particular case, which is not necessarily the highest court of the state.[109] And it must be final. The inquiry therefore is important, what are final judgments and decrees which may be reviewed in the supreme court? The general rule is as follows: A final judgment is such a judgment as at once puts an end to the action by declaring that the plaintiff has or has not entitled himself to the relief for which he sues. And a decree is final which disposes of the whole merits of the cause and leaves nothing for the further consideration of the court. A decree is interlocutory which finds the general equities, but retains the cause for reference, feigned issue, or consideration, to ascertain some matter of fact or law when again it comes under the consideration of the court for final disposition.[110] "When a decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the circuit court as is

U. S. 397, 402, 11 Sup. Ct. 296; Armstrong v. Treasurer, 16 Pet. 281; Crowell v. Randell, 10 Pet. 368; Murdock v. City of Memphis, 20 Wall. 590.

[106] Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner, 139 U. S. 293, 11 Sup. Ct. 528.

[107] Kaukauna Water Power Co. v. Canal Co., 142 U. S. 254, 12 Sup. Ct. 173.

[108] Rector v. Ashley, 6 Wall. 142.

[109] Gelston v. Hoyt, 3 Wheat. 246; McGuire v. Com., 3 Wall. 382; Green v. Van Buskerk, Id. 448.

[110] 1 Black, Judgm. §§ 21, 41.

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necessary for the purpose of adjusting by further decree the accounts between the parties pursuant to the decree passed." [111]

The statute authorizing this kind of review in the supreme court includes only the case where the decision is against the validity of a treaty or statute or authority of the United States, or where a state statute is upheld against objections to its validity based on the federal constitution or laws, or where a title or right or privilege claimed under federal law is denied. But these cases are sufficient to defend the supremacy of the national constitution and laws and protect the rights of citizens thereunder. If the decision of the state court accomplishes the same result, by recognizing the validity of the federal statute, or denying that of the state statute, or allowing the right or privilege claimed, there is no need of a review by the federal courts, and revisory jurisdiction is very properly withheld from them.[112]

POWERS AND PROCEDURE OF FEDERAL COURTS.

93. The federal courts, constituting a different system from that of the state courts, are entirely independent of the latter.

94. In cases not governed by federal statutes or treaties, the federal courts will administer the law of the state in which they sit, including the common law, statutes, and customs, so far as the same is not inconsistent with federal law.

95. The practice and procedure of the federal courts, except in equity and admiralty cases, is assimilated to that of the state within whose limits they are established.

96. The federal courts possess all such incidental and adjunct powers as belong to courts of record and which

[111] Forgay v. Conrad, 6 How. 201; Thomson v. Dean, 7 Wall. 342; Beebe v. Russell, 19 How. 283; Farrelly v. Woodfolk, Id. 288; Ogilvie v. Knox Ins. Co., 2 Black (U. S.) 539; Wabash & E. Canal Co. v. Beers, 1 Black (U. S.) 54; Milwaukee & M. R. Co. v. Soutter, 2 Wall. 440; Grant v. Phoenix Mut. Life Ins. Co., 106 U. S. 429, 1 Sup. Ct. 414; Parsons v. Robinson, 122 U. S. 112, 7 Sup. Ct. 1153.

[112] Missouri v. Andriano, 138 U. S. 496, 11 Sup. Ct. 385.

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are necessary to enable them to exercise their constitutional and statutory jurisdiction.

Independence of Federal and State Courts.

In regard to the mutual respect to be paid to their judicial proceedings, and some other matters, the federal and state courts are not regarded as foreign to each other, but as related in the same way as the courts of two separate states in the Union. But in all other regards, they are entirely distinct and independent in the exercise of their respective powers. In order that each system of courts may preserve its own independence and that neither may encroach upon the proper jurisdiction of the other, they are governed by certain fixed rules of comity and mutual respect, in cases of conflicting or overlapping jurisdiction. It should be observed, however, that these rules of comity do not grow out of the peculiar relations of the state and federal courts entirely, or the limitations upon the jurisdiction of either, but are similar to those which obtain between any two courts of co-ordinate jurisdiction, as between the several superior courts of Great Britain or the district or circuit courts of the same state. In the first place, it is a well-settled rule that, of two courts having concurrent jurisdiction of any matter, the one whose jurisdiction first attaches acquires exclusive control of all controversies respecting it involving substantially the same interests, and will hold and exercise this right until its duty is fully performed and the jurisdiction invoked is exhausted; and this rule applies to both civil and criminal cases, and is applied as between the state and national courts.[113] As each court must be left free to exercise its jurisdiction once acquired, a state court will not enjoin an action brought and pending in a federal court,[114] and it is expressly provided by act of congress that the writ of injunction shall not issue from a federal court to stay proceedings in a state court, except in the single case of matters arising under the bankruptcy laws.[115]

[113] Bruce v. Railroad Co., 19 Fed. 342; In re James, 18 Fed. 853; Owens v. Railroad Co., 20 Fed. 10; Gates v. Bucki, 4 C. C. A. 116, 53 Fed. 969; State Trust Co. v. National Land Imp. & Manuf'g Co., 72 Fed. 575.

[114] Schuyler v. Pelissier, 3 Edw. Ch. 191.

[115] Rev. St. U. S. § 720. See Diggs v. Wolcott, 4 Cranch, 179; Louisville Trust Co. v. City of Cincinnati, 73 Fed. 716. But note that this rule is re-

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For similar reasons, it is an unalterable rule that when money or goods have been taken into the possession of the officer of one of the courts (the sheriff acting under the state court or a marshal under the federal court) by the levy of an execution, an attachment, a writ of replevin, or otherwise, it cannot be taken from his possession by any writ or other process issuing from the other court.[116] When, for instance, the marshal has taken possession of a vessel, under process in admiralty, the courts of the state will not attempt, by the appointment of a receiver or otherwise, to interfere with that possession.[117] So, where a state court has full control of mortgaged property under a general assignment, a federal court will not entertain a bill asking to have the mortgage declared to be for the benefit of all the mortgagor's creditors.[118] And so, an estate which is in course of administration in a state probate court is in gremio legis, and a federal court cannot take charge of the administration, and determine and award the distributive shares of the heirs, at least as regards citizens of the same state.[119] A receiver appointed by a court of equity is an officer of that court, and the receiver's possession of the property of the trust is the possession of the court. No private suitor may interfere with that possession, or sue the receiver, without leave of the court which appointed him. By an extension of this rule, the state and federal courts have determined that neither has any power to appoint a receiver of property which

stricted to cases in which the proceedings were first begun in the state court. If the federal court first acquired jurisdiction of the proceedings, it may protect itself against being interfered with, and may, if necessary, enjoin adverse proceedings in a state court. Yick Wo v. Crowley, 26 Fed. 207.

[116] Taylor v. Carryl, 20 How. 583; Hagan v. Lucas, 10 Pet. 400; Smith v. Bauer, 9 Colo. 380, 12 Pac. 397; Williams v. Chapman, 60 Iowa, 57, 14 N. W. 89; Alabama Gold Life Ins. Co. v. Girardy, 9 Fed. 142; Walker v. Flint, 7 Fed. 435; Domestic & Foreign Missionary Soc. v. Hinman, 13 Fed. 161; Beckett v. Sheriff, 21 Fed. 32; Patterson v. Mater, 26 Fed. 31; Summers v. White, 17 C. C. A. 631, 71 Fed. 106.

[117] Thompson v. Van Vechten, 5 Duer (N. Y.) 618.

[118] Keys Manuf'g Co. v. Kimpel, 22 Fed. 466.

[119] Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906. But the mere fact that an administrator of a decedent's estate has been appointed by a state court having jurisdiction will not prevent the federal court from entertaining jurisdiction of actions brought against him as administrator. Hook v. Payne, 14 Wall. 252.

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is already in the possession of a receiver previously appointed by the other court,[120] nor in any wise interfere with the possession of such receiver.[121] If a receiver appointed by a state court, acting under orders of that court, has unlawfully taken possession of property which he is not entitled to hold, because it is not included in the trust, an application should be made to the state court to correct its order; but if it will not, an action of trespass on the case may be brought in the federal court, provided it has jurisdiction of the parties and subject-matter.[122] Again, the relation between the state and federal courts imposes a restriction upon the equity powers of either in setting off a judgment of the one against a judgment of the other. Hence when a federal court of equity is asked to set aside the satisfaction of a state judgment at law, or to determine equitable defenses to that judgment, as preliminary to a decree of set-off against a judgment of the federal court itself, the parties will be sent to a state court of competent jurisdiction to settle their controversy, and in the mean time the federal judgment will be stayed.[123]

No Common Law of the United States.

It is often said that there is no common law of the United States; that the national government being one of limited and specified powers, its entire legal system must be found in the constitution, treaties, and acts of congress; that it can have no unwritten or customary law. This is true to a certain extent. It is indisputable that the government of the United States has no inherent common-law prerogatives. It possesses only such as are conferred upon it by the constitution, and therefore has no power to interfere in the personal or social relations of citizens by virtue of authority deducible from the general nature of sovereignty.[124] Nor is there any common law of the United States, as such, which can be appealed to as conferring jurisdiction upon its courts; they possess no other jurisdiction than that concurrently conferred by the constitution and acts of con-

[120] Shields v. Coleman, 157 U. S. 168, 15 Sup. Ct. 570.

[121] Wiswall v. Sampson, 14 How. 52; Hamilton v. Chouteau, 6 Fed. 839; Andrews v. Smith, 5 Fed. 833.

[122] Curran v. Craig, 22 Fed. 101.

[123] Lauderdale Co. v. Foster, 23 Fed. 516.

[124] In re Barry, 42 Fed. 113.

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gress.[125] Again, the general government has no power to punish any act as a crime unless it is made such by the constitution or by a statute of congress; there can be no common-law crimes against the United States.[126] And not only this, but the federal criminal jurisprudence is entirely destitute of any substratum of a common law of crimes, upon which to draw for supplying elements of the offense. For this the courts look only to the statute. They may resort to the common law for the definition of crimes created by statute, or for the explanation of terms used in the constitution or acts of congress, but never for any ingredient of the offense.[127] So, also, the common-law rules relating to common carriers have no application to interstate commerce, even when the contract of carriage is made in a state where those rules prevail; for such commerce is governed solely by the laws of the United States, and the United States has never adopted the common law.[128] But "there is one clear exception to the statement that there is no national common law. The interpretation of the constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. The code of constitutional and statutory construction which, therefore, is gradually formed by the judgments of

[125] Pennsylvania v. Wheeling & B. Bridge Co., 18 How. 518, 563; In re Barry, 42 Fed. 113; 1 Kent, Comm. 331–341; 1 Whart. Cr. Law, §§ 253–256. But in those matters not subject to judicial jurisdiction, there is a complete system of executive national common law, of universal application within the limits of the United States, growing out of the exercise of their executive powers by the President and chief officers of the executive departments, and consisting of usages and customs, precedents, quasi-judicial decisions, and constructions upon the statutes, treaties, and the constitution. 8 Lawr. Compt. Dec. xxii; U. S. v. Macdaniel, 7 Pet. 1, 14.

[126] U. S. v. Eaton, 144 U. S. 677, 12 Sup. Ct. 764; U. S. v. Hudson, 7 Cranch, 32.

[127] U. S. v. De Groat, 30 Fed. 764. There are numerous instances of the necessity of resorting to the common law in search of definitions, in matters connected with the criminal law or criminal administration, in the construction of the constitution. Thus, that instrument speaks of "trial by jury," "infamous crime," "jeopardy," "due process of law," etc. Upon referring to the common law, we learn that a "jury" means a jury of 12 men drawn from the vicinage, and so with regard to the others.

[128] Swift v. Railroad Co., 58 Fed. 858.

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this court, in the application of the constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority." [179]

What Law Administered.

An act of congress provides that "the jurisdiction in civil and criminal matters conferred on the district and circuit courts for the protection of all persons in the United States in their civil rights and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the state wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the constitution and laws of the United States, shall be extended to and govern such courts in the trial and disposition of the cause." [180]

And it is a general rule that where the case is not governed by any federal statute or treaty, the federal courts will administer the law of the state wherein they sit, and will take notice of the common law of the state, and its statutes and customs, and apply them as the courts of the state would apply them to the same circumstances. And though the jurisdiction of the federal courts, as fixed by the constitution and acts of congress, can neither be enlarged or abridged by the legislative action of the states, yet any right arising under, or liability imposed by, either the common law or a statute of a state may, where the action is transitory, be asserted and enforced in any circuit court of the United States having jurisdiction of the subject-matter and the parties.[181]

Following State Decisions.

"Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that, by the course of their decisions, certain rules are established which become rules of property

[179] Smith v. Alabama, 124 U. S. 465, 478, 8 Sup. Ct. 564.
[180] Rev. St. U. S. § 722.
[181] Dennick v. Railroad Co., 103 U. S. 11.

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and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But when the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence." [182] Thus when the question concerns the construction or effect of any provision of the constitution of the state or of a state statute, and it has been authoritatively decided by the court of last resort in the state, the federal courts will consider themselves bound to adopt and apply the doctrine so laid down.[183] For instance, the question of the construction and effect of a statute of a state regulating assignments for the benefit of creditors is a question upon which the decisions of the highest court of the state, establishing a rule of property, are of controlling authority in the courts of the United States.[184] So, also the construction given by the supreme court of a state to a statute of limitations of the state will be followed by the federal courts.[185] In case of changes of opinion in the state courts, "if the highest judicial tribunal of a state adopts new views as to the proper construction of such a statute, and reverses its former decisions, this court [the supreme court of the United States] will follow the latest settled adjudications." [186] But the federal courts "cannot be expected to follow oscillations in the process of settlement," and where it is not clear that the supreme court of the state regards the question as decided, they will be free to follow their own opinions.[187] But if the construction of the state constitution or statute, as set-

[182] Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10; Townsend v. Todd, 91 U. S. 452; Atlantic & G. R. Co. v. Georgia, 98 U. S. 359; Sims' Lessee v. Irvine, 3 Dall. 425; Walker v. Commissioners, 17 Wall. 648.

[183] Cornell University v. Fiske, 136 U. S. 152, 10 Sup. Ct. 775; McElvaine v. Brush, 142 U. S. 155, 12 Sup. Ct. 156.

[184] South Branch Lumber Co. v. Ott, 142 U. S. 622, 12 Sup. Ct. 318.

[185] Bauserman v. Blunt, 147 U. S. 647, 13 Sup. Ct. 466; Leffingwell v. Warren, 2 Black, 599.

[186] Leffingwell v. Warren, 2 Black, 599.

[187] Myrick v. Heard, 31 Fed. 241.

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tled by its courts, conflicts with or impairs the efficacy of some provision of the constitution or a law of the United States, or a rule of general commercial law, the federal courts will not be bound to follow it.[138] Thus, when, at the time of creating and issuing a negotiable evidence of indebtedness of a municipal corporation in a state, the highest court of the state has construed the law under which it purports to have been issued, rights accruing under that construction will not be affected merely by subsequent decisions of the same court, varying or departing from it.[139] For similar reasons, the federal courts will follow the decisions of the state courts on questions of real-property law, especially those involving the nature or validity of titles.[140] And the same thing is true of questions of purely local law, such as the rate of interest borne by a note after maturity and until paid.[141]

But the federal courts sitting in any state have equal and co-ordinate jurisdiction with the state courts in determining questions of general commercial law, although they will, in case of doubt, lean to an agreement of views with the state courts.[142] For example, on the question of the extent to which a common carrier may legally limit his liability,[143] or on questions as to the rights and liabilities of an indorser of commercial paper,[144] the courts of the United States are not bound to follow the decisions of the state courts, but may judge for themselves. Such, also, and necessarily, is the rule when the question concerns the construction of the federal constitution, or a treaty or act of congress, or the determination of a federal question.[145] And where the question is one of general equity jurisprudence, the national courts, having an equity system of their own,

[138] Stutsman Co. v. Wallace, 142 U. S. 293, 12 Sup. Ct. 227; Gelpcke v. City of Dubuque, 1 Wall. 175; Olcott v. Supervisors, 16 Wall. 678.

[139] Anderson v. Santa Anna Tp., 116 U. S. 356, 6 Sup. Ct. 413.

[140] St. Louis v. Rutz, 138 U. S. 226, 11 Sup. Ct. 337; McKeen v. Delancy's Lessee, 5 Cranch, 22.

[141] Ohio v. Frank, 103 U. S. 697.

[142] Clark v. Bever, 139 U. S. 96, 11 Sup. Ct. 468; Swift v. Tyson, 16 Pet. 1; Roberts v. Bolles, 101 U. S. 119; Thompson v. Perrine, 103 U. S. 806.

[143] New York Cent. R. Co. v. Lockwood, 17 Wall. 357.

[144] Van Vleet v. Sledge, 45 Fed. 743.

[145] Louisville & N. R. Co. v. Palmes, 109 U. S. 244, 3 Sup. Ct. 193.

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will be under no obligation to accept the judicial decisions of the state wherein they sit.[146]

Practice.

An act of congress provides that "the practice, pleadings, and forms and modes of procedure in civil causes, other than admiralty and equity causes, in the circuit and district courts, shall conform as near as may be to the practice, pleadings, and forms and modes of procedure existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."[147] The effect of this provision is that the federal courts conform their practice, in all cases at common law, to that of the state in which they sit. If the state has adopted a code of procedure, proceedings in the federal courts, in actions at law, are governed by the code. If the state adheres to the common-law pleading and practice, the federal courts will do the same. But proceedings in equity are not affected by this rule. In regard to the jurisdiction in equity, the acts of congress provide that the practice in equity in the federal courts shall be substantially the same throughout the Union. And accordingly the federal courts have a uniform and complete system of equity procedure which is administered without reference to the system prevailing in the particular state.[148] This practice is founded on the chancery practice in England, but modified by the rules in equity made by the supreme court. Alterations in the equity jurisdiction of the states cannot affect the jurisdiction of the federal courts in equity.[149] And under the constitution, the distinction between actions at law and suits in equity must be preserved in the federal courts, even where the distinction has been abolished in the state where the court is sitting.[150] And so in Louisiana, where the civil law forms the basis of the jurisprudence of the state, and the distinction between law and equity never was known, the fed-

[146] Neves v. Scott, 13 How. 268. [147] Rev. St. U. S. § 914.

[148] Hurt v. Hollingsworth, 100 U. S. 100.

[149] In re Broderick's Will, 21 Wall. 503; Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495; Reynolds v. Bank, 112 U. S. 405, 5 Sup. Ct. 213.

[150] Bennett v. Butterworth, 11 How. 669; Scott v. Neeley, 140 U. S. 106, 11 Sup. Ct. 712.

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eral courts must still have distinct branches for such causes as would be cognizable at common law and such as would belong to the jurisdiction of equity.[151]

Adjunct Powers.

The federal courts possess all the incidental powers which are necessary to enable them to exercise their jurisdiction and fulfill their appropriate functions. Thus, they may appoint their inferior officers and see that they discharge their duties; they may admit and disbar attorneys; they may preserve order in their proceedings and maintain their own authority by punishing contempts against them; they may make rules of practice; they may issue the writs of attachment, execution, injunction, and mandamus; they may keep records; and their judgments operate as a lien upon the lands of the judgment debtor.

Habeas Corpus.

The power to issue the writ of habeas corpus, for the purpose of an inquiry into the causes of restraint of liberty, has been granted by statute to the various federal courts and their judges in certain classes of cases where its employment may be necessary to the discharge of their business, or where the deliverance of the prisoner may be necessary for the vindication of federal law or of the right of those courts to pass upon it finally. This grant of authority is subject to the following limitation: "The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof, or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof, or is in custody in violation of the constitution or of a law or treaty of the United States, or, being a citizen or subject of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depends upon the law of nations, or unless it is necessary to bring the prisoner into court to testify."[152]

[151] Fenn v. Holme, 21 How. 481. [152] Rev. St. U. S. §§ 751–753.

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REMOVAL OF CAUSES.

97. In order to secure the ends for which the grant of judicial power to the federal system of courts was made by the constitution, provision has been made, by statute, for the removal of many kinds of actions from the state courts in which they were begun into the federal courts, for trial and decision, subject to certain conditions and limitations.

It is competent for congress to authorize the removal to the federal courts of all classes of cases to which the federal judicial power of the United States, as defined by the constitution, extends, and to give them jurisdiction of the cases so removed; and it is no objection that a case authorized to be so removed is not one of which, under any act of congress, the federal courts would have had original jurisdiction.[153] Many acts of congress have been passed at different times on the subject of the removal of causes. But they were almost all repealed or superseded by the act of August 13, 1888,[154] which was designed to stand as the sole general law on the subject of removals, and must be looked to as furnishing the whole system in that regard, except in a few peculiar cases to be presently mentioned. This statute provides that any suit of a civil nature, at law or in equity, arising under the constitution or laws of the United States, or treaties, in which the amount in dispute exceeds $2,000, and which is instituted in a state court, may be removed by the defendant to the proper circuit court of the United States. But if the suit, without involving a federal question, is between citizens of different states, or citizens of the same state claiming lands under grants of different states, or between citizens of a state and aliens, it may be removed by the defendant, provided he is not a resident of the state where the suit is brought. If there is a separable controversy in any such suit, which is wholly between citizens of different states and can be fully determined as between them, then the suit may be removed on the application of either one or more of the defendants actually interested in such contro-

[153] Gaines v. Fuentes, 92 U. S. 10. [154] 25 Stat. 433.

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versy. Further, if the action is between a citizen of the state where the suit is brought and a non-resident defendant, the latter may remove the case to the federal court if he can show that, in consequence of prejudice or local influence, he will not be able to obtain justice in the courts of the state. It will be observed that the plaintiff cannot remove the suit in any event. In addition to this statute there are some earlier acts still remaining in force. Thus, section 641 of the Revised Statutes provides for the more effectual operation of the civil rights acts of congress by authorizing the removal to the federal courts of civil and criminal cases against any person who is denied, or cannot enforce, in the state courts, any rights secured to him by those laws.[155] Another section provides for the removal of indictments against revenue officers for alleged crimes against the state, where it appears that a federal question or a claim to a federal right is raised in the case and must be decided therein.[156] Another act provides for the removal of a personal action brought in any state court by an alien against a civil officer of the United States, being a non-resident of the state where the suit is brought;[157] and another for the removal of causes where one party claims lands in dispute under a grant from another state than that in which the suit is brought.[158]

The right to remove a cause from a state court to a federal court is exclusively statutory, and hence the case shown by the petition must come clearly within the statute, or the federal court will not

[155] Under this act it was held that a negro, prosecuted in a state court, could not remove the case merely because there was such a local prejudice against his race and color as to deprive him of the benefit of a fair trial. Texas v. Gaines, 2 Woods, 342, Fed. Cas. No. 13,847. Rev. St. § 640, provided that suits against certain federal corporations might be removed to the federal courts, upon a verified petition "stating that such defendant has a defense arising under or by virtue of the constitution or of any treaty or law of the United States." It was held under this act, that the mere fact that the corporation was organized under a law of the United States was sufficient to secure a removal. Turton v. Union Pac. R. Co., 3 Dill. 366, Fed. Cas. No. 14,273. But this law was expressly repealed by section 6 of the act of August 13, 1888.

[156] Tennessee v. Davis, 100 U. S. 257.

[157] Rev. St. § 644.

[158] Rev. St. § 647.

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take jurisdiction.[159] Whether or not the case is one which is properly removable, and whether the proper steps to effect a removal have been duly taken, are questions for the federal court to determine.[160]

When the ground of removal is diverse citizenship, and there are several plaintiffs or defendants, all the parties must possess the requisite diversity of citizenship. That is, a removal will not be in order if any one of the plaintiffs is a citizen of the same state with any one of the defendants.[161] Corporations are within the removal acts, and they are presumed to be citizens of the state which chartered them.[162] So also, for the purpose of removing causes, public and municipal corporations are citizens of the state by which they were created.[163]

Cases "arising under the constitution and laws of the United States" present the same class of federal questions as those of which the federal courts are given original jurisdiction by the terms of the constitution. For example, a United States marshal, being sued in trespass for the seizure of property under an attachment, and defending upon the ground that the property seized belonged to the defendant in the attachment, may remove the case to the federal court, for his act was done in executing the laws of the United States.[164]

As to the nature of suits removable, it may be remarked that the language of the statutes is wide enough to include every sort of judicial proceeding in the nature of an action at law or suit in equity, whether founded on contract, tort, or otherwise. Thus, proceedings for the appropriation of private property for public use, under the power of eminent domain, are removable actions, if the requisite diversity of citizenship exists.[165]

[159] Insurance Co. v. Pechner, 95 U. S. 183; Gold Washing & Water Co. v. Keyes, 96 U. S. 199.

[160] Osgood v. Chicago, D. & V. R. Co., 6 Biss. 330, Fed. Cas. No. 10,604.

[161] Strawbridge v. Curtiss, 3 Cranch, 267; Blake v. McKim, 103 U. S. 336; Removal Cases, 100 U. S. 457.

[162] Farmers' Loan & Trust Co. v. Maquillan, 3 Dill. 379, Fed Cas. No. 4,668.

[163] Barclay v. Levee Com'rs, 1 Woods, 254, Fed. Cas. No. 977.

[164] Bock v. Perkins, 139 U. S. 628, 11 Sup. Ct. 677; Etheridge v. Sperry, 139 U. S. 266, 11 Sup. Ct. 565.

[165] Boom Co. v. Patterson, 98 U. S. 403; Patterson v. Boom Co., 3 Dill. 465,

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In regard to the stage of the cause at which the removal must be applied for, the act of 1888 provides, in respect to all removals except those under the prejudice and local influence clause, that the application must be made "at the time or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff." Where the ground of removability is prejudice or local influence, it directs that the application be made "at any time before the trial of the cause." [166]

It is not permissible for the states to deny the right of removal in cases where it is granted by congress, nor to put any restrictions or limitations upon it. Thus where a state statute creates a right of action for damages for personal injuries under certain circumstances, an action, founded on the statute, between citizens of different states, may be brought in a federal court, or removed thereto, notwithstanding the statute assumes to limit the remedy to suits in the courts of the state.[167] Nor is it competent for a state, by legislative enactment conferring upon its own courts exclusive jurisdiction of proceedings or suits involving the settlement and distribution of decedents' estates, to exclude the jurisdiction in such matters of the federal courts, where the constitutional requirement as to citizenship of the parties is met.[168] And on the same principle, state statutes permitting foreign corporations to do business within their limits only on condition that they will not remove suits against them into the federal courts, are void.[169]

Fed. Cas. No. 10,829; Warren v. Wisconsin Val. R. Co., 6 Biss. 425, Fed. Cas. No. 17,204.

[166] See Hazard v. Railroad Co., 4 Biss. 453, Fed. Cas. No. 6,276.

[167] Railway Co. v. Whitton's Adm'r, 13 Wall. 270.

[168] Clark v. Bever, 139 U. S. 96, 11 Sup. Ct. 468.

[169] Home Ins. Co. v. Morse, 20 Wall. 445; Hartford Fire Ins. Co. v. Doyle, 6 Biss. 461, Fed. Cas. No. 6,160; Doyle v. Continental Ins. Co., 94 U. S. 535; Barron v. Burnside, 121 U. S. 186, 7 Sup. Ct. 931.

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CHAPTER VIII.

THE POWERS OF CONGRESS.

98. Constitution of Congress.
99–100. Organization and Government of Congress.
101. Powers of Congress Delegated.
102–103. Exclusive and Concurrent Powers.
104. Enumerated Powers of Congress.
105. Implied Powers.
106. Limitations on Powers of Congress.

CONSTITUTION OF CONGRESS.

98. All legislative powers granted to the United States by the constitution are vested in a congress, which consists of two co-ordinate branches, viz.

(a) The senate.

(b) The house of representatives.

The senate is composed of two senators from each state, chosen by the legislature thereof, for six years, and each senator has one vote. The senate is arranged in three classes, the term of one of such classes expiring every second year; so that at every change in the house of representatives, one-third of the senate also changes. If vacancies happen by resignation or otherwise during the recess of the legislature of the state, the governor may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies. No person shall be a senator who shall not have attained the age of thirty years and have been nine years a citizen of the United States, and he must, when elected, be an inhabitant of that state for which he shall be chosen. The Vice-President of the United States is the president of the senate, but he has no vote except in the case of a tie.

The first article of the constitution provides that the house of representatives shall be composed of members chosen every second year by the people of the several states, and that the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature. To be eligible

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to the office of a representative in congress, it is necessary that the person should have attained the age of twenty-five years and have been a citizen of the United States for at least seven years, and he must, at the time of his election, be an inhabitant of the state choosing him. Representatives are apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when a state chooses to deny the right of voting to any of its male inhabitants who are citizens of the United States and twenty-one years of age, or abridges such right, except for participation in rebellion or other crime, then the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state. When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

The times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof, but congress may at any time by law make or alter such regulations, except as to the places of choosing senators.

Congress shall assemble at least once in every year, and such meeting shall be on the first Monday of December, unless they shall by law appoint a different day. A majority of each house constitutes a quorum for the transaction of business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each house may provide.

No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office. By the third section of the fourteenth amendment it is provided that no person shall be a senator or representative who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States,

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shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may by a vote of two-thirds of each house remove such disability.

ORGANIZATION AND GOVERNMENT OF CONGRESS.

99. The constitution invests congress as a body, and each house of congress, with all needful power to regulate its own organization and government.

100. Each house of congress possesses the usual and necessary parliamentary powers, among which are the following:

(a) It is the exclusive judge of the election, qualification, and return of its own members.

(b) Its members are absolutely privileged from being questioned or proceeded against for their speeches or debates made in the line of their official duty.

(c) Its members, during the session of their house, and in going to and returning from the same, are privileged from arrest, except for

(1) Treason.

(2) Felony.

(3) Breach of the peace.

(d) It may make its own rules of procedure.

(e) It may punish its members for disorderly behavior, and expel a member by a two-thirds vote, and (in a limited class of cases) may punish other persons for contempts of its authority.

The house of representatives may choose its speaker and other officers, and may originate all bills for raising revenue. The senate has power to choose its officers except its permanent president, and choose a president pro tempore. It may also propose or concur with amendments to revenue bills. Each house has power to judge of the election, return, and qualification of its own members; to compel the attendance of absent members; to determine the rules of its proceedings; to punish its members for disorderly behavior; to

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expel a member, two-thirds concurring; and to publish its journal, or withhold from publication such parts thereof as in its judgment may require secrecy. Both houses together (that is, congress as a body) may make or alter the regulations enacted by the states as to the time, place, and manner of holding elections for senators and representatives, except as to the places of choosing senators; may appoint a day for their assembling other than the first Monday of December; may agree to adjourn for more than three days or to another place; and may fix their own compensation.

Contested Elections.

The power to judge and determine a contested election to congress belongs solely and entirely to that branch of congress in which the contest occurs. It is not a matter over which the states or their courts have any jurisdiction. The state courts, for instance, cannot assume to decide whether the election of a United States senator by the state legislature conforms to the regulations of congress or is void.[1] And if a witness in a contested congressional election case, testifying before a notary public of a state, swears falsely, the courts of that state have no power to punish him for perjury. He can be proceeded against only in the federal courts and under the federal criminal law.[2] Congress has power to regulate elections held in the states for membership in its own body, and to provide for the punishment of frauds and crimes committed at such elections.[3]

Privilege of Members.

The sixth section of the first article of the constitution provides that senators and representatives "shall in all cases except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house they shall not be questioned in any other place." As to the last clause of this provision, it will be more fully considered in connection with the subject of the guaranties of "freedom of speech and of the press," in a later chapter. As to the former clause, it should be remarked that the privilege of members of congress ex-

[1] In re Executive Communication, 12 Fla. 686.
[2] In re Loney, 134 U. S. 372, 10 Sup. Ct. 584.
[3] U. S. v. Gale, 109 U. S. 65, 3 Sup. Ct. 1; U. S. v. Belvin, 46 Fed. 381.

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empts then not only from arrest (save in the three excepted cases) on any criminal process, but also from the service of all process the disobedience to which is punishable by attachment of the person, such as a subpœna ad respondendum or ad testificandum, or a summons to serve on a jury. This results from the reason on which the privilege is based, which is, that the member ought not to be taken bodily into custody, or required personally to appear before the courts, when he has superior duties to perform as a legislator in another place.[4] But this reason does not hold good with respect to mere citations or writs of summons in civil actions; and consequently, the member is not exempt from the service of such process during the session of his house.[5] The privilege guarantied by the constitution to members of congress extends as well to delegates from the territories as to senators and representatives from the states.[6]

Congress might by law provide the details which may be necessary for giving full effect to the enjoyment of this privilege. This has not been done; but the matter seems to stand, says Jefferson, upon the following grounds: (1) The act of arrest is void ab initio. (2) The member arrested may be discharged on motion, or by writ of habeas corpus, or on a warrant of the house executed by its sergeant at arms or other proper officer. (3) The arrest, being unlawful, is a trespass for which the officer making it and others concerned are liable to action or indictment in the ordinary courts of justice, as in other cases of unauthorized arrest. (4) The court before which the process is returnable is bound to act as in other cases of unauthorized proceeding, and liable also, as in other similar cases, to have its proceedings stayed or corrected by the superior courts.[7]

Rules of Procedure.

The supreme court has sustained the validity of a rule of the house of representatives which authorized the counting in of members who were present in the house but refused to vote, in order to make up a quorum. "The constitution," it was said, "empowers each house to determine its rules of proceeding. It may not by its

[4] 1 Story, Const. § 860; Jeff. Man. § 8; Anderson v. Rountree, 1 Pin. (Wis.) 115.

[5] Rhodes v. Walsh, 55 Minn. 542, 57 N. W. 212; Merrick v. Giddings, MacArthur & M. (D. C.) 55. But compare Miner v. Markham, 28 Fed. 887.

[6] Doty v. Strong, 1 Pin. (Wis.) 84. [7] Jeff. Man. § 8.

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rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate, or even more just. It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and, within the limitations suggested, absolute and beyond the challenge of any other body or tribunal." [8]

Power to Punish for Contempts.

There is no power given by the constitution to either house of congress to punish for contempts, except when committed by its own members. And the supreme court has decided that neither house possesses any general power to punish for contempts, and that they cannot, by the mere act of asserting a person to be guilty of a contempt, establish the right to fine or imprison, or preclude redress through a collateral inquiry into the grounds on which the order was made. Except in a case where the constitution expressly confers upon one or the other house powers which are in their nature somewhat judicial, and which require the examination of witnesses, they possess no power to compel, by fine or imprisonment or both, the attendance of witnesses and answers to interrogatories which do not relate to some question of which the house has jurisdiction. But since each branch of congress has certain specific powers to make orders, which require the examination of witnesses, in that class of cases, where a witness refuses to testify, the house may enforce this duty by fine and imprisonment as a punishment for contempt. But these occasions are limited to such cases as the punishment of its own members for disorderly conduct or failure to attend sessions, or in cases of contested elections, or in regard to the qualifications of its own members, or in case of an effort to impeach an officer of the government, and perhaps a few other cases.[9]

[8] U. S. v. Ballin, 144 U. S. 1, 12 Sup. Ct. 507.

[9] Kilbourn v. Thompson, 103 U. S. 168; Anderson v. Dunn, 6 Wheat. 204. See, also, Miller, Const. 414; 2 Hare, Am. Const. Law, 851.

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POWERS OF CONGRESS DELEGATED.

101. The government of the United States being one of delegated powers, the field of its legislative authority is not unbounded. The power of congress to pass any given law is derived from and limited by the federal constitution.

The power of congress to pass any given law must, on the one hand, be found in some express grant of authority given to congress by the constitution, or necessarily implied in its terms, or be found necessary to carry into effect such powers as are there granted. And on the other hand, the act in question must not be in violation of any of the prohibitions laid upon congress by the same instrument.[10] As to the ultimate determination of the limits of federal power, it has been argued that, as the government of the Union is one of delegated powers, the right to decide upon the extent of the powers granted remains with the several states or with the people, under the provisions of the tenth amendment, and has not been confided to the national government itself. But it is now settled, both by authority and precedent, that the government of the Union is to judge, in the first instance at least, of the extent of the powers granted to it, as well as of the means of their proper exercise. In practice, the constitutionality of any act of congress must be determined by the federal judiciary. And if the general sentiment of the people is not in accord with its findings, redress must be sought at the polls.[11]

[10] Martin v. Hunter, 1 Wheat. 304, 326; Calder v. Bull, 3 Dall. 386; Briscoe v. Bank of Kentucky, 11 Pet. 257; Gilman v. Philadelphia, 3 Wall. 713; Kilbourn v. Thompson, 103 U. S. 168; 2 Story, Const. § 1907.

[11] See McCulloch v. Maryland, 4 Wheat. 316; Ferris v. Coover, 11 Cal. 175; 1 Story, Const. § 432.

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EXCLUSIVE AND CONCURRENT POWERS.

102. Some of the powers granted to congress by the constitution are vested exclusively in that body; some others may be exercised concurrently by the states in the absence of action by the national government thereon. A power vested in congress is exclusive of all state action on the same subject when—

(a) It is made so by the express language of the constitution.

(b) Where in one part of the constitution an authority is granted to congress and in another part the states are prohibited from exercising a like authority.

(c) Where a similar power in the states would be inconsistent with and repugnant to the authority granted to congress, that is, where the subject matter of the power is national and can be governed only by a uniform system.

103. In cases not falling under any of the foregoing heads, the states may lawfully pass laws relating to the subject of the power, unless and until congress shall take action for exercising the power with which it is invested. But in such cases of concurrent authority, when congress exercises its power it thereby supersedes and suspends all existing state legislation on the same subject, and prohibits similar state legislation until it shall again leave the field unoccupied.[12]

As an illustration of the first species of exclusive powers mentioned above, it is provided by the constitution that congress shall "exercise exclusive legislation in all cases whatsoever" over the district to be appropriated as the seat of government. Here the effect is to shut out not only state legislation conflicting with the regula-

[12] Gibbons v. Ogden, 9 Wheat. 1; McCulloch v. Maryland, 4 Wheat. 316; Houston v. Moore, 5 Wheat. 1; Brown v. Maryland, 12 Wheat. 419; Weaver v. Fegely, 29 Pa. St. 27.

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tions of congress but all state legislation whatever. As an illustration of the second class of exclusive powers, it will be noticed that one of the enumerated powers of congress (but not in terms exclusive) is the power to "coin money." In another part of the constitution it is provided that "no state shall . . . coin money." This necessarily invests congress with the sole right to establish a mint. In the third place, if the subject matter of the power is of such a nature as to relate to the concerns and the prosperity of the nation as a whole, and can be properly regulated only by a uniform national law, and if any action by the several states upon it would be inconsistent with that plenary control of congress which can alone effectuate these objects, then the authority of congress is exclusive, though not made so in express words. Thus, it was formerly thought that interstate commerce was a subject on which the states themselves might make rules and regulations, in the absence of any general action of congress on the same subject. But the supreme court has recently decided otherwise. "Whenever a particular power of the general government," it is said, "is one which must necessarily be exercised by it, and congress remains silent, this is not only not a concession that the powers reserved by the states may be exercised as if the specific power had not been elsewhere reposed, but on the contrary, the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the states cannot be permitted to effect that which would be incompatible with such intention. Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale, and exchange of commodities, is national in its character and must be governed by a uniform system, so long as congress does not pass any law to regulate it, or allowing the states so to do, it thereby indicates its will that such commerce shall be free and untrammelled." [13]

There is another sense in which the powers of congress may be said to be exclusive. The states cannot, by indirect attacks, prevent their being carried into effect or unduly hamper their exercise. Where any right or privilege is subject to the regulation of congress, it is not competent for state laws to impose conditions which shall interfere with the right or diminish its value.[14] And on the same

[13] Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681.

[14] Cranson v. Smith, 37 Mich. 309.

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principle, it is not within the constitutional power of a state to lay any tax upon the instruments, means, or agencies provided or selected by the general government to enable it to carry into execution its legitimate powers and functions.[15]

But in all cases where the powers vested in congress are not, for any of the foregoing reasons, exclusive, the states may legislate on the same subject matter. But in regard to these cases of concurrent powers, "the concurrency of the power may admit of restrictions or qualifications in its nature or exercise. In its nature, when it is capable from its general character of being applied to objects or purposes which would control, defeat, or destroy the powers of the general government. In its exercise, when there arises a conflict in the actual laws and regulations made in pursuance of the power by the general and state governments. In the former case, there is a qualification ingrafted upon the generality of the power, excluding its application to such objects and purposes. In the latter case, there is (at least generally) a qualification not upon the power itself, but only upon its exercise, to the extent of the actual conflict in the operations of each." [16]

Furthermore, in all such cases of concurrent authority, the enactments of the individual states can be no more than provisional; that is to say, their continuance in force depends upon the determination of congress not to exercise its own power over the subject by a general law. If congress shall choose to enter upon the domain confided to its jurisdiction, and to regulate the same by a statute, the result is that all existing state laws on the same subject are superseded and suspended, at least so far as they are inconsistent with the act of congress. The federal law does not make them invalid, if they were not so before. Neither does it repeal them. It merely assumes to itself entire control of the whole subject and leaves nothing for the state laws to operate upon. But no change of policy on the part of the state is indicated, such as would render it inconsistent to enforce the provisions of a statute which had been repealed. Hence a penalty incurred for a violation of the state law before the passage of the act of congress may be recovered after its passage.[17]

[15] McCulloch v. Maryland, 4 Wheat. 429; Osborn v. Bank of U. S., 9 Wheat. 738; Ward v. Maryland, 12 Wall. 418.

[16] 1 Story, Const. § 447. [17] Sturgis v. Spofford, 45 N. Y. 446.

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ENUMERATED POWERS OF CONGRESS.

104. The specific powers granted to congress in the first article of the constitution are as follows:

(a) To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States.

(b) To borrow money on the credit of the United States.

(c) To regulate commerce with foreign nations and among the several states and with the Indian tribes.

(d) To establish an uniform rule of naturalization and uniform laws on the subject of bankruptcies throughout the United States.

(e) To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures.

(f) To provide for the punishment of counterfeiting the securities and current coin of the United States.

(g) To establish post offices and post roads.

(h) To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

(i) To constitute tribunals inferior to the supreme court.

(j) To define and punish piracies and felonies committed on the high seas and offenses against the law of nations.

(k) To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

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(l) To raise and support armies (but no appropriation of money to that use shall be for a longer term than two years.)

(m) To provide and maintain a navy.

(n) To make rules for the government and regulation of the land and naval forces.

(o) To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.

(p) To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by congress.

(q) To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may by cession of particular states and the acceptance of congress become the seat of government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.

(r) To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this constitution in the government of the United States or in any department or officer thereof.

(s) Moreover, in the fourth article is found the following: "Congress shall have power to dis-

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pose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

(t) And finally, "New states may be admitted by the congress into the Union."

Taxation.

By the terms of the constitution, congress shall have power "to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States, but all duties, imposts, and excises shall be uniform throughout the United States." Article 1, § 8. "No capitation or other direct tax shall be laid unless in proportion to the census or enumeration hereinbefore directed to be taken. No tax or duty shall be laid on articles exported from any state." Article 1, § 9. As the constitution originally stood, the following language was found in its first article and second section: "Representatives and direct taxes shall be apportioned among the several states which may be included in this Union according to their respective numbers," etc. But the fourteenth amendment provides that "Representatives shall be apportioned among the several states," etc. The omission of the words "and direct taxes" from the amended clause appears to do away with the necessity of this method of apportionment of such taxes, in so far as it depended upon the original clause. But the provision of the ninth section of the first article that no "direct tax shall be laid unless in proportion to the census or enumeration," probably accomplishes the same result. And if a direct tax should again be laid, it is not likely that it would be attempted to levy it in a different manner from that which was adopted before the fourteenth amendment was in force.

The general nature of the power of taxation, and the constitutional limitations upon its exercise, will be fully considered in the chapter devoted to that subject. At present it is designed only to consider the power as vested in congress under the words quoted above, and the express limitations of the constitution. This power, as thus vested, is not unlimited. On the contrary, it is limited both in respect to the purposes for which it may be exercised and in respect to the manner in which taxes shall be levied.

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In the first place, the federal power of taxation is limited in respect to the purposes for which it may be exercised. The language of the clause of the constitution which contains the grant of this power is so far ambiguous as to admit of several possible meanings. But it is the universally accepted interpretation that the clause is to be read as if it declared that "congress shall have power to lay and collect taxes, etc., in order to pay the debts and provide for the common defense and general welfare of the United States." [18] It appears therefore that congress possesses the power of taxation, not for any and all purposes, but only for the three enumerated purposes, viz., to pay the debts of the United States, to provide for the common defense, and to provide for the general welfare of the United States. As the first two objects are very clear and specific, it is evident that questions as to the constitutional validity of any tax law of congress will chiefly arise under the third. That is, the question will be, does the tax in fact provide for, or promote, the general welfare of the United States? It is on this ground that objection has been taken to the constitutionality of the system of a protective tariff.[19]

Attention should be given to the four words used in the clause under consideration and their different meanings. "Taxes" is the most general and comprehensive of the four. It is a generic term, and includes duties, imposts, and excises. But as these latter terms have specific meanings, and as the larger word is sometimes used in contradistinction to the terms of more restricted scope, it was proper that they should all be enumerated in the constitution. "Duties" is a term of larger import than "imposts." They both relate to commercial intercourse, but duties are leviable on either imports or exports, while imposts relate only to goods brought into the country from abroad. Practically, however, the use of the word "duties" adds nothing to the scope of this grant of power, for another clause of the constitution forbids the imposition of duties on articles exported from any state. "Excises" means taxes laid upon the manufacture, sale, or consumption of commodities within the country and

[18] Pom. Const. Law, § 273; Miller, Const. pp. 229–231; 1 Story, Const. §§ 907–921.

[19] See 1 Story, Const. §§ 958–974; Veazie Bank v. Fenno, 8 Wall. 533; Merchants' Nat. Bank v. U. S., 101 U. S. 1; In re Sternbach, 45 Fed. 175.

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upon licenses to pursue certain occupations. A "capitation tax" is a poll tax. It is a fixed sum exacted from each person, without reference to his property or pursuits. But the chief difficulty has arisen in determining what is the difference between direct taxes and such as are indirect. In general usage, and according to the terminology of political economy, "a direct tax is demanded of the person who it is intended shall pay it. Indirect taxes are demanded from one person in the expectation that he will indemnify himself at the expense of others." [20] When the question of the difference between direct and indirect taxes first came before the supreme court of the United States, it was held that the term "direct," as used in the constitution, was to be taken in a narrower sense than that above indicated; and it was ruled that only two classes of taxes could be considered as coming under this designation, viz., taxes on land and capitation taxes.[21] But these decisions have recently been overruled, and it is now held that income taxes, whether levied on the issues and profits of real estate or on the gains and interest from personal property, are also "direct taxes" within the meaning of the constitution.[22] It seems, however, that a tax on the circulation of state banks,[23] or a succession tax imposed upon "every devolution of title to real estate," [24] are not to be included in this category.

In regard to the manner of laying taxes, the federal authorities are placed under certain restrictions. Capitation and other direct taxes must be laid in proportion to the census or enumeration. "Duties, imposts, and excises shall be uniform throughout the United States." The requirement of uniformity in tax laws has given rise to a great deal of litigation and to many various or even conflicting rulings of the courts. It will be more fully considered in another connection. At present it is only necessary to remark that this requirement of the constitution is complied with if the tax operates with the same effect in all places where the subject of it is found. There is no want of uniformity simply because the thing

[20] Burroughs, Tax'n, § 3.

[21] Pacific Ins. Co. v. Soule, 7 Wall. 433; Springer v. U. S., 102 U. S. 586; Hylton v. U. S., 3 Dall. 171.

[22] Pollock v. Trust Co., 158 U. S. 601, 15 Sup. Ct. 912.

[23] Veazie Bank v. Fenno, 8 Wall. 533.

[24] Scholey v. Rew, 23 Wall. 331.

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taxed is not equally distributed in all parts of the United States.[25]

The power of taxation necessarily includes the authority to make provision for the collection of the taxes in all such modes and by all such means as are not inconsistent with the constitutional guaranties to private rights and property. Various methods of collection have been resorted to by congress at different times. The customs duties may be enforced by seizure and detention of the dutiable articles. Some of the internal revenue taxes are collected by the sale of stamps to be placed upon the specific articles taxed; others, by the issue of licenses upon payment of a fixed fee. The direct taxes levied during the late war were collected, when necessary, by sale of the delinquent lands.

The limitations upon the taxing power of the federal government must be sought in the constitution, and nowhere else. Many of these limitations we have already incidentally considered, as in regard to the purposes for which taxes may be levied, and the method of assessing direct taxes. An important provision is that which prohibits the imposition of taxes or duties on articles exported from any state. It has been held that a requirement that articles intended for exportation shall be stamped, in order to prevent fraud and secure the carrying out of the declared intent, is not laying a duty on such articles, although a small charge is made for the stamp.[26] But if the stamp were required as a source of revenue to the government, it would amount to a tax, and therefore be invalid.[27]

Money Powers of Congress.

Congress possesses power, under the constitution, to borrow money on the credit of the United States, and to coin money and regulate the value thereof and of foreign coin, and to provide for the punishment of counterfeiting the securities and current coin of the United States. The states equally possess the power to borrow money on their own credit, but they are prohibited by the constitution from coining money or emitting bills of credit and from making anything but gold and silver coin a tender in payment of debts. In this connection should be noticed the provisions pledging the public faith

[25] Head-Money Cases, 112 U. S. 580, 5 Sup. Ct. 247.
[26] Pace v. Burgess, 92 U. S. 372.
[27] Almy v. California, 24 How. 169.

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to the security of the public debt. These are the first paragraph of the sixth article, as follows: "All debts contracted and engagements entered into before the adoption of this constitution shall be as valid against the United States under this constitution as under the confederation," and the fourth section of the fourteenth amendment, as follows: "The validity of the public debt of the United States authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void."

Same—Borrowing Money.

As the grant of power to congress to borrow money is general and unlimited in its terms, it follows, on settled principles of interpretation, that it rests in the exclusive discretion of congress to select the means or methods of exercising the power. Money may be raised by the issue and sale of government bonds, or by issuing certificates of indebtedness, or scrip, or other forms of obligations for debts or services rendered. Or the same purpose may be accomplished by the issue of treasury notes, either directly, or indirectly through the instrumentality of the national banks. This principle was settled at an early day in our national history by the decisions sustaining the charter of the Bank of the United States. This institution was established as a useful and convenient means of aiding the general government in the management of its finances, negotiating its loans, collecting its revenues, and regulating the currency. The power of congress to create such a corporation, though denied by the executive, was sustained by the supreme court.[28] As the power of congress to borrow money is unlimited in respect to the means which may be employed in its exercise, so also is it unlimited in respect to the purposes for which money may be raised. The grant must necessarily be taken as co-extensive with the needs and activities of the government. Every purpose for which money may be legiti-

[28] McCulloch v. Maryland, 4 Wheat. 316; Osborn v. Bank of U. S., 9 Wheat. 738. See, also, 2 Story, Const. §§ 1259–1271.

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mately expended by the United States is therefore also a purpose for which congress may lawfully exercise its power to borrow money. Nor can this power be in any way controlled or interfered with by the states. The granting of the power is incompatible with any restraining or controlling power, and the declaration of supremacy in the constitution is a declaration that no such restraining or controlling power shall be exercised.[29] It follows that the states cannot tax the loans of the United States, whether they be evidenced by bonds, notes, scrip, or otherwise, nor its financial operations, however they may be conducted, nor the means or instrumentalities, such as banks, employed by the government in its monetary system, unless with the consent of the federal government, and then only in strict compliance with the terms of such permission.[30]

Same—Coining Money.

"The power to coin money," says Story, "is one of the ordinary prerogatives of sovereignty, and is almost universally exercised, in order to preserve a proper circulation of good coin of a known value in the home market."[31] To coin money is to fashion pieces of metal into a prescribed shape, weight, and degree of fineness, and stamp them with prescribed devices, emblems, or other marks, by authority of government, in order that they may circulate as a medium of exchange. Seigniorage is a charge made by government for coining bullion into money at its mints. This power includes the power to establish mints and assay offices. The power to regulate the value of coined money includes the authority to determine what denominations of money shall be struck at the mint, and also to fix the standard of purity, that is, to determine what proportion of pure metal and what proportion of alloy shall enter into the composition of each coin. The constitution does not declare what coins shall be struck, nor prescribe the metal or metals to be used for this purpose. The choice of congress is entirely unrestricted. And if a bimetallic standard is to be maintained, the power to regulate the coinage includes the right to make such adjustments as may be necessary to main-

[29] 2 Story, Const. § 1055; Weston v. City Council of Charleston, 2 Pet. 449; Bank Tax Case, 2 Wall. 200; Van Allen v. Assessors, 3 Wall. 573.

[30] The Banks v. The Mayor, 7 Wall. 16; Bank v. Supervisors, 7 Wall. 26.

[31] 2 Story, Const. § 1118.

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tain a uniform standard. The power to regulate the values of foreign coins, in so far as they are employed within this country in transactions to which the government is a party, is a necessary correlative of the powers already noticed. In point of fact, the value of the coins of some foreign nations is subject to such fluctuations that this power is frequently very necessary to preserve anything like a uniform standard. The latest action of congress taken in pursuance of this power is found in the act of October 1, 1890,[32] which provides that "the value of foreign coins, as expressed in the money of account of the United States, shall be that of the pure metal of such coin of standard value; and the values of the standard coins in circulation of the various nations of the world shall be estimated quarterly by the director of the mint, and be proclaimed by the secretary of the treasury."

Same—Legal Tender.

In 1862 and 1863, during the prevalence of the civil war, congress authorized the issue of a large amount of treasury notes, and provided that they should be a legal tender in payment of private debts and also of all public dues except duties on imports and interest on the public debt. These notes went into immediate circulation, and largely caused the gold and silver coin to disappear from the market. When the constitutionality of this law was first contested before the supreme court of the United States, it was adjudged that while the statute was valid in so far as it might apply to the payment of debts thereafter to be contracted, there was no constitutional authority for its attempted application to debts existing at the time of its passage.[33] But shortly afterwards the question came again before the court, and this decision was reversed. The personnel of the court had in the mean season been changed, and a majority was now in favor of sustaining the validity of the statute. It was accordingly adjudged that it was within the constitutional power of congress to make such notes a legal tender in payment of debts, private as well as public, and pre-existing as well as subsequently contracted.[34]

[32] 26 Stat. 624, § 52. [33] Hepburn v. Griswold, 8 Wall. 603.

[34] Legal-Tender Cases (Knox v. Lee), 12 Wall. 457; Dooley v. Smith, 13 Wall. 604; Bigler v. Waller, 14 Wall. 297; Juilliard v. Greenman, 110 U. S.

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Regulation of Commerce—Origin of the Power.

The reasons which induced the framers of the constitution to incorporate in it a provision giving to congress the right to regulate commerce with foreign nations and among the several states are so obvious, and so intimately connected with the main purposes for which a central authority was established, as to require but little comment. It should be remembered that the very first movement towards an amendment of the original articles of confederation consisted in a proposal to confer upon the general government more enlarged powers over the subject of commerce. When the convention assembled, it was universally agreed that this matter, if no other, must be committed to the central authority. "The oppressed and degraded state of commerce previous to the adoption of the constitution," says Story, "can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests, and our disunited efforts to counteract their restrictions were rendered impotent by a want of combination. Congress indeed possessed the power of making treaties, but the inability of the federal government to enforce them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the states." [55] It is generally understood that Madison was the author of this clause of the constitution, and was the one most strongly and personally interested in its incorporation in the constitution. The extreme importance of confiding this power to the councils of the nation is made

421, 4 Sup. Ct. 122. Persons entering into a contract which calls for the payment of money have the right to specify the currency in which the payment shall be made (as gold or "coined money"), and if they do so, the courts will require the terms of the contract to be observed, and in giving judgment upon it will direct that the judgment shall be paid in the medium specified by the parties. Bronson v. Rodes, 7 Wall. 229; Butler v. Horwitz, Id. 258; Trebilcock v. Wilson, 12 Wall. 687.

[55] 2 Story, Const. § 1058.

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apparent by the reluctance which Rhode Island manifested in regard to ratifying the constitution. This state enjoyed, at that time, the advantage of possessing one of the finest harbors on the whole Atlantic coast, situated at Newport. And a very large proportion of all the commerce conducted by all the northern states with foreign countries sought this port. Heavy taxes and duties were laid upon importations coming to the port of Newport, and the revenue derived by the state from this source alone was sufficient to defray all its public expenses. The prospect of being deprived of this very profitable means of raising revenue, by acceding to a constitution which would forever remove such regulations from the sphere of its competence, and prevent all discriminations against other less favored states, operated so strongly as to keep Rhode Island out of the Union for over two years.

Same—In General.

This clause of the constitution does not vest in congress the plenary control over commerce of every description, in the same way in which it is invested with paramount authority over the subjects of naturalization and bankruptcy. The commerce which is subject to the regulation of the national legislature is such only as is transacted with foreign countries or among the several states or with the Indian tribes. It follows that each state retains full and complete control over all such commerce as is conducted wholly within its own borders. It is not until commerce passes the boundaries of a state and enters upon a course which is to end in another state or a foreign country that it becomes subject to the regulation of congress.[86] "Nor can it be properly concluded that, because the products of domestic enterprise in agriculture or manufactures, or in the arts, may ultimately become the subjects of foreign commerce, that the control of

[86] Veazie v. Moor, 14 How. 568; The Passaic Bridges, 3 Wall. 782. The continuous transportation of freight from a point within the state to another point within the state, over a line of railway partly within the state and partly within another state, is not interstate commerce. Campbell v. Railway Co., 86 Iowa, 587, 53 N. W. 351. Service of a summons from a Massachusetts court on a citizen of Vermont, who is at the time of service traveling through Massachusetts in order to attend court in Connecticut as a witness for and at the request of a citizen of Massachusetts, is not invalid as an unlawful interference with interstate commerce. Holyoke & S. H. F. Ice Co. v. Ambden, 55 Fed. 598.

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the means or the encouragements by which enterprise is fostered and protected is legitimately within the import of the phrase foreign commerce, or fairly implied in any investiture of the power to regulate such commerce." [87] The power of congress in this regard is one which may be exercised partially, gradually, or temporarily. It was not intended that congress must avail itself of this authority at once and to the verge of its limits or not at all. It is competent for congress to select certain aspects, relations, or departments of such commerce, as the subjects of its legislation, and to refrain from taking any action on the others. For example, a navigation law is none the less a regulation of commerce because it does not regulate all possible modes in which commerce may be carried on. So it is within the authority of congress to build up a complete system of regulation for foreign and interstate commerce by degrees and a part at a time. And undoubtedly its regulations may be either temporary or permanent, as its discretion may determine, and may be changed from time to time as the interests or policy of the whole people may seem to require. But speaking generally, it has been said that "commerce, in its largest sense, must be deemed to be one of the most important subjects of legislation; and an intention to promote and facilitate it, and not to hamper or destroy it, is naturally to be attributed to congress." [88]

Same—The Leading Case.

The leading case on the subject of this power of congress is that of Gibbons v. Ogden.[89] The opinion was written by Chief Justice Marshall, and is universally conceded to be one of the greatest efforts of his profound and luminous intellect. It contains an exhaustive disquisition on the subject of commerce and its regulation by congress, in all its bearings and aspects, and has furnished principles, or at least arguments, for the guidance of the courts in a very large proportion of the numerous and diverse cases which have since demanded solution at their hands. But the points actually decided in this case were only these: That commerce includes navigation, whether

[87] Veazie v. Moor, 14 How. 568, 574.

[88] Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 16 Sup. Ct. 666; Interstate Commerce Commission v. Alabama Midland Ry. Co., 74 Fed. 715.

[89] 9 Wheat. 1.

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the motive power be steam or sails, and that when congress has legislated, in pursuance of its constitutional power, on any particular subject or department of commerce, the states are precluded from taking any action which would interfere with or tend to annul the acts of congress.

Same— What is Included.

The word "commerce," as here used, is to be broadly construed. Its general meaning is intercourse by way of trade and traffic between different peoples or states. But as used in the constitution, the term is not restricted to the sale and exchange of commodities, but includes also their transportation, whether this be by land or sea. Nor is it restricted to the fact or process of commercial intercourse, but includes as well the substance of commerce; and not only this, but it covers also the means, agencies, or instrumentalities by which commerce is carried on. It is not limited to the transportation of freight, but extends equally to passenger traffic, and even to the transmission of telegraphic messages. Many, if not all, of the incidents of commerce are within its scope. For example, it extends to the regulation and government of seamen on American ships; to the establishment of rules of navigation, the law of the road at sea, and the marine system of lights and signals; to the protection and security of commerce, including laws respecting light-houses, beacons, buoys, dykes, dams, levees, the improvement of rivers and harbors, derelicts, and wrecks of the sea; to the designation of ports of entry and delivery; to the charges of railroads engaged in interstate commerce, and many other such subjects.[40] This grant, moreover, was not made with reference solely to the condition and course of commerce as these existed at the time the constitution was formed. Its terms

[40] U. S. v. Craig, 28 Fed. 795; 2 Story, Const. §§ 1075, 1076. Natural gas, in the earth, may not be a commercial commodity, but when brought to the surface and placed in pipes for transportation, it completely assumes that character. Now the transportation of commercial commodities from state to state is interstate commerce, and a state can lay no burdens or restrictions upon it. Hence a state statute which has for its object to prevent persons from conveying natural gas out of the state and into another state, with the imposition of penalties for so doing, is unconstitutional and void. State v. Indiana & Ohio Oil, Gas & Min. Co., 120 Ind. 575, 22 N. E. 778. But see Jamieson v. Indiana Natural Gas & Oil Co., 128 Ind. 555, 28 N. E. 76.

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are broad enough to permit the authority and its exercise to keep pace with the progress and development not only of commercial intercourse but also of the means employed in that intercourse. Powers and agencies are now made available for the interchange of commodities which were little dreamed of by the fathers of the Republic. But the advance of science and the arts serves only to enlarge the field for the exercise of legislative authority, in this regard, without affecting the limits of the power itself.[41]

Same — When Exclusive, When Concurrent.

The question whether the power of congress to regulate foreign and interstate commerce is exclusive, or whether the states have a concurrent authority, to any extent, over the same subject, is the most difficult which has arisen in the construction of this clause of the constitution. The general result of the authorities may be stated as follows: First, the states cannot lawfully adopt any measures tending directly to regulate, obstruct, or interfere with such commerce as is confided to the paramount control of congress, or which may be inconsistent with the legislation of congress on the same subject.[42] Second, if the particular subject to which the power is to be directed is national in its character, or is such that it can properly be regulated only by a uniform system, in so much that varying regulations by the different states would cause inconvenience or detriment, it is not competent for the states to legislate on the subject, and if congress does not act, its silence is to be taken as an evidence of its will that the subject shall be free from all regulation or restriction.[43] Third, local and limited matters, not national in their character, which are most likely to be wisely provided for by such diverse rules as the authorities of the different states may deem applicable to their own localities, may be regulated by the state legislatures, in the absence of any act of congress on

[41] Pensacola Tel. Co. v. W. U. Tel. Co., 96 U. S. 1, 9.

[42] Brown v. Maryland, 12 Wheat. 419; Welton v. Missouri, 91 U. S. 275; Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681; Gibbons v. Ogden, 9 Wheat. 1.

[43] Bowman v. Chicago & N. W. R. Co., 125 U. S. 465, 8 Sup. Ct. 689, 1062; County of Mobile v. Kimball, 102 U. S. 691; Robbins v. Shelby County Taxing Dist., 120 U. S. 489, 7 Sup. Ct. 592; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 5 Sup. Ct. 826; Brown v. Houston, 114 U. S. 622, 5 Sup. Ct. 1091.

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the same subject.[44] Fourth, there are certain classes of state legislation which, although they may incidentally or remotely affect foreign or interstate commerce, are not intended as regulations thereof, but have their primary relation to the domestic concerns of the particular state or of its citizens, and are properly in the nature of police regulations. In the absence of any act of congress covering the same ground, such laws are valid. And it is understood that, in so far as they relate to or affect commerce, congress, by refraining from acting on the same subject, sanctions and adopts them.[45] But there are certain classes of state legislation which so directly affect foreign or interstate commerce, or so plainly impose a burden or restriction upon it, that they are void even though they may not come in conflict with any regulation of congress on the same subject. As an illustration of this rule, we may cite the case of Railroad Co. v. Husen,[46] where the question arose upon a statute of Missouri, intended to prevent the introduction into that state of a disease supposed to be prevalent among the cattle in Texas, and which in effect declared that no cattle from Texas should be admitted into the state until they had been kept a sufficient time to prevent any danger of contagion. This act was adjudged unconstitutional, inasmuch as it amounted to an entire prohibition on the railroads from transporting cattle from the one state into or through the other.

Same—Navigation.

The power of congress to regulate commerce includes the power to regulate navigation, in so far as it is conducted between this country and foreign nations or between the several states. And this power extends both to salt and fresh waters, and is not limited by the ebb and flow of the tide. Even though the particular stream may lie wholly within the limits of a single state, yet navigation on it is subject to the regulating power of the national government if it forms part of a chain or system of waters leading to foreign countries or other states. In fact, this power extends to all navigable waters of the United States. And "they constitute navigable waters

[44] Miller, Const. 454; Cooley v. Board of Wardens, 12 How. 299; Willson v. Blackbird Creek Marsh Co., 2 Pet. 245.

[45] Sherlock v. Alling, 93 U. S. 99.

[46] 95 U. S. 465.

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of the United States when they form, in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries." [47] Even when a vessel is plying between ports of the same state, yet if it is navigating the high seas, it is subject, as well as the business in which it is engaged, to the regulating power of congress.[48] But a state may improve its own rivers and harbors, and take toll from those who use the improvements, provided the navigation of the waters is kept free and there is no interference with any system established by authority of congress.[49] So also a state may authorize the erection of a dam across a navigable river which is wholly within its limits, in the absence of any legislation of congress bearing on the case.[50] The authority to regulate ferries has never been claimed by the general government, but has always been exercised by the states. Consequently, an act of congress declaring a particular river to be a common highway, free to all citizens of the United States, does not interfere with the right of the state to create and regulate ferries thereon and license the owners of boats engaged in such ferry service.[51] But the states cannot impose license taxes upon tugs and towboats engaged in navigating the high seas and the great waterways of commerce.[52] Nor can they impose restrictions or conditions upon such vessels, except such as may relate only to the policing of their own harbors.[53]

The power to regulate navigation, as a part of foreign and interstate commerce, includes, as briefly stated above, the regulation of its incidents. In this connection congress has passed laws prescribing rules for navigation on the high seas, laws establishing a system of light-houses and buoys, life-saving stations, and other

[47] The Daniel Ball, 10 Wall. 557, 563; Gibbons v. Ogden, 9 Wheat. 1; Veazie v. Moor, 14 How. 568.

[48] Lord v. Steamship Co., 102 U. S. 541; Pacific Coast S. S. Co. v. Board of Railroad Com'rs, 18 Fed. 10.

[49] Sands v. Improvement Co., 123 U. S. 288, 8 Sup. Ct. 113; Benjamin v. Improvement Co., 42 Mich. 628, 4 N. W. 483.

[50] Pound v. Turck, 95 U. S. 459.

[51] Fanning v. Gregoire, 16 How. 524; Chiapella v. Brown, 14 La. Ann. 189.

[52] Moran v. New Orleans, 112 U. S. 69, 5 Sup. Ct. 38; Harman v. Chicago, 147 U. S. 396, 13 Sup. Ct. 306.

[53] Sinnot v. Davenport, 22 How. 227.

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means of protecting and preserving those engaged in navigation, laws for the regulation of ports and harbors and the improvement of rivers and other waterways, laws for the government of American seamen, and laws relating to the liability of ship-owners and others engaged in commerce, either declaring, altering, or supplementing the rules of the common law or the general law-merchant.

Same—Vessels.

Since ships are among the principal means or instruments by which foreign and interstate commerce is carried on, it follows that they are subject to the regulation of congress. Hence all federal laws relating to the registry or nationality of American ships, or prescribing rules for their transfer, or for the recording of such transfers, or determining what shall be sufficient evidence of title to them, or providing for the recording of mortgages of ships, are to be sustained as enacted under the commerce power.[54] And since the authority of congress in this respect is paramount, state laws, in so far as they may be inconsistent with the acts passed by congress, must yield in authority. Thus, for example, an act of congress providing for the recording of mortgages of ships will control the state statute of frauds.[55] While the states cannot tax ships as instruments of commerce, yet they may tax the owners of ships for their interest in the same as personal property.[56]

Same—Regulation of Ports and Harbors.

In the class of subjects generally left to the legislation of the individual states is included the regulation of ports and harbors, in respect to the establishment of harbor lines, the maintenance and regulation of wharves, state inspection laws, local pilotage rules, and all such measures as belong to the police regulation of the public ports and waterways of a state. The harbors and other navigable waters of a state are indeed subject to the regulating power of congress, in so far as they belong to or are used for that kind of commerce which may be denominated foreign or interstate,

[54] White's Bank v. Smith, 7 Wall. 646; Blanchard v. The Martha Washington, 1 Cliff. 463, Fed. Cas. No. 1,513; Foster v. Chamberlain, 41 Ala. 158; Shaw v. McCandless, 36 Miss. 296.

[55] Mitchell v. Steelman, 8 Cal. 363.

[56] Transportation Co. v. Wheeling, 99 U. S. 273; City of St. Louis v. Ferry Co., 11 Wall. 423; Howell v. Maryland, 3 Gill, 14.

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just as much as are the high seas. But until congress chooses to enter upon the field of legislation, in respect to the subjects here mentioned, state laws on those subjects are valid and must be enforced, and when congress acts, those laws are not repealed but suspended in their operation.[57] But a state statute entitling port wardens to receive a certain sum or fee for every vessel coming into port, whether they are called on to perform any service or not, is a regulation of commerce and unconstitutional.[58]

Same—Embargo.

The limits of the power of congress to regulate foreign commerce were very seriously considered in connection with the embargo laid upon such commerce in 1807, at the special recommendation of Jefferson, then President. Against the constitutionality of this measure it was urged that an embargo suspending foreign commerce for an indefinite or unlimited period cannot properly be described as a "regulation" of commerce, since it results in a temporary destruction of it. The power to regulate, it was said, does not include the power to annihilate. The supreme court has never passed upon this question. But it was decided in the inferior courts that the embargo act was a valid exercise of the power of congress, because it was not aimed at the destruction of commerce, but was intended as a means of defending, preserving, and protecting our foreign commerce. There can be no doubt, however, that this act went to the very extreme limit of the lawful exercise of this great power of congress.[59]

Same—Pilotage.

The states retain the power, until congress shall act, to establish rules for the qualification and licensing of pilots and as to their services upon vessels approaching or leaving their ports and the fees to be charged therefor. But as the subject concerns foreign commerce, it is within the domain intrusted to the control of congress, and that body has power either to adopt a uniform system on the subject of

[57] Henderson v. Spofford, 59 N. Y. 131; The James Gray v. The John Fraser, 21 How. 184; Steamship Co. v. Joliffe, 2 Wall. 450.

[58] Steamship Co. v. Portwardens, 6 Wall. 31; Hackley v. Geraghty, 34 N. J. Law, 332.

[59] See 2 Story, Const. §§ 1289–1292.

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pilots, or to adopt and sanction the systems in force in the several maritime states. And if it should make the entire subject national in its character, and prescribe uniform rules and regulations, all provisions of the state statutes which might be inconsistent therewith would have to give way.[60] But a state pilot law which discriminates in favor of "coasters within the state" or vessels of that and the two adjoining states, conflicts with the federal statute and is void.[61]

Same—Quarantine.

It is within the lawful power of each state to enact laws to guard against the introduction of contagious or infectious diseases from foreign countries. To this end it may establish quarantine stations and provide for the inspection of vessels coming from abroad to ascertain their sanitary condition, and require such vessels to pay a fee to cover the cost of such inspection. Statutes of this character are not regarded as regulations of commerce but as police laws. At the same time they may and do in a sense affect foreign commerce, and for that reason the subject of quarantine is equally under the control of congress, and state laws must yield in all points where they are inconsistent with such general regulations as congress may see fit to impose.[62]

Same—Imports.

In pursuance of its power to regulate foreign commerce, congress has passed many laws with regard to the importation into this country of articles from abroad. Most of these acts have been so plainly within the scope of the power in question that their constitutionality has never been called in controversy before the courts. A detailed examination of these statutes is beyond our present purpose, but reference in general terms may be made to the laws establishing a tariff of customs duties, those designating the ports of entry, and those creating and regulating the bonded warehouse system. After goods imported from abroad have reached the custom house, they remain in the possession of the United States until delivered to

[60] The Panama, Deady, 27, Fed. Cas. No. 10,702; Cisco v. Roberts, 6 Bosw. (N. Y.) 494.

[61] Spraigue v. Thompson, 118 U. S. 90, 6 Sup. Ct. 988.

[62] Morgan's Louisiana & T. R. & S. S. Co. v. Louisiana Board of Health, 118 U. S. 455, 6 Sup. Ct. 1114.

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the consignee, and the United States has a lien on them for the duties. During that period they cannot be attached or levied on, or otherwise taken out of the custody of the federal officers by any state process.[63] The states cannot lay any tax upon goods imported from abroad so long as they remain in the hands of the original importer, or, having left his hands, so long as they remain in the original packages of importation. When the importer has parted with them, or when the original cases have been broken up, then the goods become taxable as a part of the general mass of property in the state.[64]

Same—Immigration.

The term "commerce," as used in the constitution, is not limited to an exchange of commodities, but includes as well intercourse with foreign nations. And the term "intercourse" includes the transportation of passengers.[65] Consequently it is within the power of congress, under this grant, to regulate immigration. It may totally prohibit the coming into the United States of any class, degree, or nationality of immigrants, or it may prescribe conditions or restrictions upon such immigration, or impose a tax on the owners or masters of vessels bringing foreigners into the country. Examples of the exercise of this power by congress may be seen in the statute which forbids the importation of alien laborers under contract, and in that which excludes the Chinese. The only limitation upon the power of congress in this respect is that its regulations or prohibitions must not contravene the provisions of treaties between this country and foreign nations.[66] This rule also involves a limitation upon the power of the states. The several states may not lay any restriction upon immigration. It is not within the power of a state to impose taxes upon such immigration, or upon the masters or owners of vessels bringing foreigners into their ports for the privilege of so doing, or upon the aliens themselves. Such a tax would be an

[63] Harris v. Dennie, 8 Pet. 292.

[64] Brown v. Maryland, 12 Wheat. 419; Cook v. Pennsylvania, 97 U. S. 566; People v. Wilmerding, 62 Hun, 391, 17 N. Y. Supp. 102; Waring v. Mayor, 8 Wall. 110.

[65] People v. Raymond, 34 Cal. 492; Passenger Cases, 7 How. 283.

[66] Edye v. Robertson (Head Money Cases), 112 U. S. 580, 5 Sup. Ct. 247; U. S. v. Craig, 28 Fed. 795.

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unlawful regulation of foreign commerce.[67] But a state law which requires a report to be made of the passengers brought from abroad into one of its ports, and prescribes a fine as a penalty for failure to comply with its terms, is not regarded as a regulation of commerce, but merely as a police regulation, and is not invalid.[68]

Same—Railroads.

Inasmuch as the control over commerce includes the means or agencies by which it is carried on, it follows that the business of railroad companies, in so far as it concerns traffic between points which do not lie within the same state, is subject to the regulation of congress and exempt from that of the states.[69] Congress may provide that all railroad companies may carry passengers, mails, and property over their roads and bridges, on their way from one state to another, and receive compensation therefor, and may connect with other roads so as to form continuous lines for the transportation of the same to their places of destination.[70] And congress likewise has authority to construct or authorize the construction of railroads across the states and territories of the United States, and the franchises thus conferred cannot, without its permission, be taxed by the states.[71] The most important application of this principle is in the limitation which it imposes upon the power of the states, in respect to interstate railroads, and especially with reference to taxation. A state law requiring all carriers engaged in interstate commerce to furnish equal privileges and accommodations to all persons using their conveyances, without discrimination on account of race or color, is not valid.[72] Neither have the states any power to impose taxes

[67] Henderson v. Mayor of City of New York, 92 U. S. 259; Chy Lung v. Freeman, Id. 275; People v. Downer, 7 Cal. 169; People v. Compagnie Générale Transatlantique, 107 U. S. 59, 2 Sup. Ct. 87; People v. Pacific Mail S. S. Co., 16 Fed. 344; Passenger Cases, 7 How. 283.

[68] New York City v. Miln, 11 Pet. 102.

[69] "The state may make reasonable regulations to secure the safety of passengers, even on interstate trains, while within its borders. But the state can do nothing which will directly burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for such traffic." Illinois Cent. R. Co. v. Illinois, 163 U. S. 142, 16 Sup. Ct. 1096.

[70] Railroad Co. v. Richmond, 19 Wall. 584.

[71] California v. Central Pac. R. Co., 127 U. S. 1, 8 Sup. Ct. 1073.

[72] Hall v. De Cuir, 95 U. S. 485. But such law is valid if it is strictly

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on travel on railroads running through or between states;[73] nor upon the offices or agencies of railroads engaged in interstate commerce;[74] nor upon the gross receipts of a railroad company, when such receipts are in part derived from the transportation of passengers and property into, through, and out of the state.[75] But if the state can distinguish between receipts derived from commerce which is carried on wholly within its own limits and such as are derived from interstate commerce, and tax only the former, or levy a tax upon a portion of the capital stock of the company or a portion of the value of its property, such portion fairly representing the value of the stock or property employed in its business within the state, as distinguished from that which is employed in interstate business, in either such case the tax does not amount to an interference with that commerce which is under the control of congress, but is lawful and valid.[76] The same rule applies to the taxation of parlor cars or sleeping cars. A privilege tax on sleeping cars is void in so far as it applies to the interstate transportation of passengers.[77] But since the state has a right to tax personal property within its jurisdiction, even though it may be employed in interstate commerce, a state tax on such proportion of the whole capital stock of a foreign sleeping-car company as the number of miles over which its cars are operated within the state bears to the total number of miles over which its cars are run, is valid and constitutional, although such cars are run into, through, and out of the state.[78] A state statute imposing on express companies a tax on their "receipts for business done within this state" is not an interference with interstate commerce.[79]

confined to business done within the state. Louisville, N. O. & T. Ry. Co. v. Mississippi, 133 U. S. 587, 10 Sup. Ct. 348.

[73] Piek v. Chicago & N. W. Ry. Co., 6 Biss. 177, Fed. Cas. No. 11,133; Id., 94 U. S. 164; Clark v. Philadelphia, W. & B. R. Co., 4 Houst. (Del.) 158; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 10 Sup. Ct. 958.

[74] McCall v. California, 136 U. S. 104, 10 Sup. Ct. 881.

[75] Fargo v. Michigan, 121 U. S. 230, 7 Sup. Ct. 857.

[76] Delaware Railroad Tax, 18 Wall. 206.

[77] Pickard v. Pullman South. Car Co., 117 U. S. 34, 6 Sup. Ct. 635.

[78] Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876.

[79] Pacific Exp. Co. v. Seibert, 142 U. S. 339, 12 Sup. Ct. 250.

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Same—Bridges.

Under this grant of power, congress has control over the navigable waters of the United States, that is, such waters as, in themselves or with their connections, form a continuous highway over which foreign or interstate commerce is or may be carried on. And in connection therewith, it is within the constitutional authority of congress to take measures for keeping such highways free and open for such commerce, and preventing obstructions. It may therefore prevent the erection of bridges over such streams, by the states or by private persons or corporations under their authority, or it may declare that a bridge so erected is not an obstruction to commerce but a lawful bridge, and it may also authorize or provide for the construction of bridges over streams between two states, and provide that such bridges shall be free for the crossing of all trains of railroads terminating on the sides of the river respectively.[80] The states may authorize the construction of railroad or other bridges across navigable streams, provided they do not interfere with any existing regulations of congress applicable to such streams, and do not constitute a material impediment to the course of commerce on those rivers. The latter requirement presents a question of fact which must be decided in each case with reference to its peculiar circumstances. But in general, if the obstruction to navigation caused by the bridge is greater than the benefit to the general commerce of the country resulting from it, it may be abated as a nuisance, otherwise it will stand.[81] But it must be remembered that, for the purpose of regulating commerce, congress retains paramount and plenary control over the navigable waters of the United States. Congress is not precluded, by anything that may have been done under the authority of a state, from assuming entire control,

[80] See Railroad Co. v. Richmond, 19 Wall. 584; Pennsylvania v. Wheeling Bridge Co., 13 How. 518; Miller v. Mayor, etc., of New York, 109 U. S. 385, 3 Sup. Ct. 228; South Carolina v. Georgia, 93 U. S. 4; Escanaba & L. M. T. Co. v. Chicago, 107 U. S. 678, 2 Sup. Ct. 185.

[81] Cardwell v. American Bridge Co., 113 U. S. 205, 5 Sup. Ct. 423; Gilman v. Philadelphia, 3 Wall. 713; Hamilton v. Vicksburg, S. & P. R. Co., 119 U. S. 280, 7 Sup. Ct. 206; Jolly v. Terre Haute Drawbridge Co., 6 McLean, 237, Fed. Cas. No. 7,441; Silliman v. Hudson River Bridge Co., 4 Blatchf. 74, Fed. Cas. No. 12,851.

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abating any erections that may have been made, and preventing any others from being made except in conformity with such regulations as it may prescribe. Or on the other hand, it may legalize a state bridge and declare it to be a lawful structure.[82]

Same—Telegraphs.

With reference to the electric telegraph, it has been said: "It cannot for a moment be doubted that this powerful agency of commerce and intercommunication comes within the controlling power of congress, certainly as against hostile state legislation."[83] No state can impose an impediment to the freedom of such communication by attempting to regulate the delivery in other states of messages received within its own borders.[84] In regard to state taxation of telegraph companies, the rule settled by the United States supreme court, with reference to such companies as have accepted the provisions of the act of congress relative to their use of the public domain,[85] is that they "cannot be taxed by the authorities of a state for any messages, or receipts arising from messages, from points within the state to points without, or from points without the state to points within, but that such taxes may be levied upon all messages carried and delivered exclusively within the state. The foundation of this principle is that messages of the former class are elements of commerce between the states, and not subject to legislative control of the states, while the latter class are elements of internal commerce, solely within the limits and jurisdiction of the state, and therefore subject to its taxing power."[86] Hence a single tax assessed under the laws of a state upon receipts of a telegraph company, which were partly derived from interstate commerce and partly from commerce within the state, and which were capable of separation, but were returned and assessed in gross and without separation or apportionment, is invalid in proportion to the extent that such receipts were derived from interstate commerce,

[82] Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 8 Sup. Ct. 811; Wheeling Bridge Case, 13 How. 518, 18 How. 421.

[83] Pensacola Tel. Co. v. W. U. Tel. Co., 96 U. S. 1.

[84] W. U. Tel. Co. v. Pendleton, 122 U. S. 347, 7 Sup. Ct. 1126.

[85] Rev. St. U. S. §§ 5263–5268.

[86] W. U. Tel. Co. v. Alabama State Board of Assessment, 132 U. S. 472, 10 Sup. Ct. 161.

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but is otherwise valid.[87] But a state may lawfully provide that every telegraph company owning a line in the state shall be taxed on such proportion of the whole value of its capital stock as the length of the line within the state bears to the whole length of the line everywhere, after deducting the value of any property owned by it and subject to local taxation in the cities and towns of the state. Such a tax is not an unlawful interference with interstate commerce.[88] It has also been ruled that the transmission of messages by the telephone may be interstate commerce.[89]

Same—Trade Marks.

Statutes have been passed by congress purporting to secure to merchants and manufacturers exclusive rights in the use of registered trade marks. But the validity of such laws, at least in so far as they are not confined to commerce with foreign nations or among the several states, but virtually apply to all commerce at all points, cannot be sustained under the commerce clause of the constitution. Whether or not a trade mark has such a relation to commerce as to bring it within congressional control when used or applied to the classes of commerce which fall within that control, remains still an unsettled general question.[90]

Same—Penal Legislation.

The power of congress to regulate commerce gives it also the right and power to provide by law for the punishment of offenses committed against commerce or of such a character as to defeat or obstruct it. For example, it has power to define and punish larceny from a ship, even when the vessel is not at sea.[91] In the exercise of the powers confided to congress over interstate commerce and the postal system, it is competent for the national authorities to remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce or the carrying of the mail. While it may

[87] Ratterman v. W. U. Tel. Co., 127 U. S. 411, 8 Sup. Ct. 1127; Telegraph Co. v. Texas, 105 U. S. 460.

[88] Massachusetts v. W. U. Tel. Co., 141 U. S. 40, 11 Sup. Ct. 889; W. U. Tel. Co. v. Attorney General, 125 U. S. 530, 8 Sup. Ct. 961; W. U. Tel. Co. v. Taggart, 163 U. S. 1, 16 Sup. Ct. 1054.

[89] In re Pennsylvania Tel. Co., 48 N. J. Eq. 91, 20 Atl. 846.

[90] Trade-Mark Cases, 100 U. S. 82.

[91] U. S. v. Coombs, 12 Pet. 72.

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be competent for the government, through the executive branch, and with the use of the entire executive power of the nation, forcibly to remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and if any such are found to exist, to invoke the power of those courts to remove or restrain such obstructions. The jurisdiction of the courts to interfere in such matters by injunction is one recognized from ancient times and by indubitable authority.[92]

Same—Commercial Law.

This clause of the constitution cannot be so broadly interpreted as to give congress the power to enact a general code of commercial law which should be binding on the several states and their courts. Some incidents or branches of the law of merchants may come within the regulative power of the federal government under this provision, and the individual states are so far prohibited from regulating it that their acts must impose no restriction or hindrance upon foreign or interstate commerce. Also, the courts of the United States do not consider themselves bound by the decisions of the state courts on questions of general commercial law, but will be guided by their own conception of the doctrines of the mercantile law.[93] To this extent, therefore, there may be said to be a general commercial law of the United States, but its origin is not derived from the power of congress to regulate commerce.

Same—Limitations on the Power.

The power of congress to regulate foreign and interstate commerce is subject to two restrictions or limitations, prescribed in the same instrument by which the authority is granted. In the first place, the constitution provides that no tax or duty shall be laid on articles exported from any state. And secondly, it is provided that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another." [94]

[92] In re Debs, 158 U. S. 564, 15 Sup. Ct. 900.
[93] Oates v. National Bank, 100 U. S. 239.
[94] Const. U. S. art. 1, § 9.

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State Interference with Commerce Power.

The power of congress to regulate foreign and interstate commerce involves a corresponding limitation upon the power of the states. That is, it is not within the lawful power of a state to regulate such commerce, or to impose restrictions or conditions upon it, or to interfere with it in any manner which would be inconsistent with the paramount control of congress or with the specific acts or the general policy of congress in regard thereto. Thus a state law which imposes limitations upon the powers of a corporation, created under the laws of another state, to make contracts within the state for carrying on commerce between the states, violates this clause of the constitution.[95] And so far as it may be necessary to protect the products of other countries and states from discrimination by reason of their foreign origin, the power of the national government over commerce reaches the interior of every state in the Union.[96] Hence a state law which prevents a non-resident manufacturer of liquors from sending his goods into the state, and there disposing of them in the original packages, through a clerk located there, is void as a regulation of interstate commerce.[97]

Same—Taxation.

Certain of the limitations upon the taxing power of the states, growing out of the control of congress over commerce, have already been noticed. But it remains necessary further to develop the general principles and to cite some further illustrations. In the first place, a tax distinctly laid on the commerce which comes under the regulation of congress is void, even though congress has refrained from legislating on the subject.[98] The fairest and most just construction of the constitution "leads to the conclusion that no state has a right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on

[95] Cooper Manuf'g Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739.

[96] Guy v. Baltimore, 100 U. S. 434.

[97] Lyng v. Michigan, 135 U. S. 161, 10 Sup. Ct. 725.

[98] McCulloch v. Maryland, 4 Wheat. 316, 425; Brown v. Maryland, 12 Wheat. 419, 437; Low v. Austin, 13 Wall. 29; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. 4; Robbins v. Shelby County Taxing Dist., 120 U. S. 489, 7 Sup. Ct. 592.

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the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to congress."[99] Interstate carriage of freight does not consist merely in transporting it through the state. If it starts from within the state in transit to another state, or if it comes into the state, as its destination, from abroad, it is the subject of interstate commerce, and cannot be taxed by the state.[100]

But "while interstate commerce cannot be regulated by a state, by the laying of taxes thereon in any form, yet whenever the subjects of taxation can be separated, so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the state, the distinction will be acted upon by the courts, and the state permitted to collect that arising from commerce solely within its own territory."[101] Goods, the product of a state, intended for exportation to another state, are liable to taxation as part of the general mass of property of the state of their origin, until actually started in course of transportation to the state of their destination, or delivered to a carrier for that purpose. That is, it is not until the transit has commenced which is to end out of the state that the goods become the subject of interstate commerce, and as such are subject to national regulation and cease to be taxable by the state of their origin.[102] And conversely, goods sent from one state to another cease to be in transit, and can be subjected to taxation, the moment they reach their place of destination and are there offered for sale, provided they are taxed as other goods are, and not by reason of their being brought into the state from another state, and are not subjected to any unfavorable discrimination.[103] A tax laid by a state law in such a manner as to discriminate unfavorably against goods which are the

[99] Leloup v. Port of Mobile, 127 U. S. 640, 8 Sup. Ct. 1380; Fargo v. Michigan, 121 U. S. 230, 7 Sup. Ct. 857; Philadelphia & Southern S. S. Co. v. Pennsylvania, 122 U. S. 326, 7 Sup. Ct. 1118.

[100] State Freight Tax Cases, 15 Wall. 282.

[101] Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192, 12 Sup. Ct. 806; Maine v. Grand Trunk R. Co., 142 U. S. 217, 12 Sup. Ct. 121, 163.

[102] Coe v. Errol, 116 U. S. 517, 6 Sup. Ct. 475; Brown v. Houston, 114 U. S. 622, 5 Sup. Ct. 1091.

[103] Pittsburg & S. Coal Co. v. Bates, 40 La. Ann. 226, 8 South. 642.

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product or manufacture of another state, is an unlawful regulation of commerce.[104] And a state license tax on "drummers" which operates to the disadvantage of non-resident manufacturers or dealers, or tends to discriminate against the introduction and sale of the products of another state, is for the same reason void.[105] But yet the state has the right to "tax trades, professions, and occupations, in the absence of inhibition in the state constitution in that regard, and where a resident citizen engages in general business subject to a particular tax, the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and non-resident merchants, of goods situated in another state, does not necessarily involve the taxation of interstate commerce, forbidden by the constitution."[106] The business of insurance, as ordinarily conducted, is not commerce, and a corporation having an agency by which it conducts such business in another state, is not engaged in interstate commerce. Hence this provision of the constitution does not prevent the state from taxing foreign insurance companies or prescribing the conditions on which they may do business within its limits.[107] Neither is there any violation of the constitution in a tax imposed by a state upon brokers dealing in money or exchange. It is true that foreign bills of exchange are instruments of commerce. But such a tax is not laid specifically upon bills of exchange, or upon them as instruments of commerce.[108] For similar reasons, a state tax on legacies or successions payable to aliens is not repugnant to the constitution. Such legacies are not "exports," and the tax has no relation to commerce.[109]

[104] Woodruff v. Parham, 8 Wall. 123; Hinson v. Lott, Id. 148; Webber v. Virginia, 103 U. S. 344; Welton v. Missouri, 91 U. S. 275; Tiernan v. Rinker, 102 U. S. 123.

[105] Walling v. Michigan, 116 U. S. 446, 6 Sup. Ct. 454; Hurford v. State, 91 Tenn. 669, 20 S. W. 201; Corson v. Maryland, 120 U. S. 502, 7 Sup. Ct. 655; Asher v. Texas, 128 U. S. 129, 9 Sup. Ct. 1; Crutcher v. Kentucky, 141 U. S. 47, 11 Sup. Ct. 851.

[106] Ficklen v. Shelby County Taxing Dist., 145 U. S. 1, 12 Sup. Ct. 810.

[107] Paul v. Virginia, 8 Wall. 168; State v. Phipps, 50 Kan. 609, 31 Pac. 1097; Insurance Co. of North America v. Com., 87 Pa. St. 173; Hooper v. California, 155 U. S. 648, 15 Sup. Ct. 207.

[108] Nathan v. Louisiana, 8 How. 73.

[109] Mager v. Grima, 8 How. 490.

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Same—Police Power.

The states have no rightful authority to regulate or interfere with foreign or interstate commerce under the pretense of enacting police regulations. The commerce power of congress and the police power of the states are both necessary and both must be sustained, but neither should encroach upon the proper sphere of the other. This will be more fully shown in the chapter specially devoted to the consideration of the police power.

Interstate Commerce Act.

The most important legislation of congress, in the exercise of its power to regulate commerce among the several states, is that which is embodied in the act of 1887, commonly called the "Interstate Commerce Act." [110] By the terms of this act, it applies to all common carriers engaged in the transportation of persons or property, by rail or water or both, under a common control or management or arrangement, from one state to another, or from any point in the United States into a foreign country, or from a point in the United States through a foreign country to another point in the United States. But the act is not to apply to traffic carried on wholly within a state. All charges made by such carriers for services rendered in such business shall be reasonable and just. No unjust discrimination shall be made, whether by rebate, special rate, drawback, or other device, nor shall any undue preference be given to any person, corporation, or locality, or to any particular description of traffic. Equal facilities for the interchange of traffic shall be extended to connecting lines, and no discrimination shall be made as between such lines. No greater aggregate charge shall be made for a "short haul" than for a "long haul," except by authorization of the commissioners. Carriers are prohibited from pooling their freight or earnings, and combinations among carriers, intended to prevent the transportation of goods from being continuous to their place of destination, are declared unlawful. A right of action for damages is given to any person injured by a violation of any of the provisions of the act. A commission, composed of five members, is established for carrying into effect the provisions of the act, and they are authorized to hear and investigate complaints, and to enforce the provisions of the

[110] 24 Stat. 379.

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law. All common carriers subject to the provisions of the act are required to make annual reports to the commission, setting forth certain statistics of their business.

Commerce with Indian Tribes.

Intercourse between the people of the United States and the Indian tribes "is a subject of federal jurisdiction, the same as the naturalization of aliens, the subject of bankruptcies, or the establishment of post offices; and therefore congress may pass laws regulating or even forbidding it, and providing for the punishment of acts or conduct growing out of it or connected therewith, resulting in injury to either the Indian or the other party, or calculated to interrupt or destroy its peaceful or beneficial character."[111] The power of congress in this regard is not limited by state lines or governments, but may be exercised and enforced wherever the Indians are found, whether upon the reservations, in the territories, or within the states.[112] And congress may regulate intercourse or commerce not only between white persons and Indians, but also between the different Indian tribes and between their members. If, for instance, it should enact by law that one Indian tribe should not furnish arms or ammunition to another Indian tribe, this would be within its constitutional powers. So also is a law prohibiting any person from disposing of spirituous liquors to an Indian; and this includes the case of one Indian who sells liquor to another Indian.[113]

Naturalization.

The power of congress to provide a uniform system for the naturalization of aliens is exclusive, and its exercise is entirely incompatible with the exercise of any similar authority on the part of the several states.[114] An alien is one who, in consequence of his birth under a foreign jurisdiction, is not by nature entitled to the privileges of citizenship in the particular state or country. And naturalization

111 U. S. v. Bridleman, 7 Fed. 894.

112 U. S. v. Barnhart, 22 Fed. 285; U. S. v. Bridleman, 7 Fed. 894.

113 U. S. v. Shaw-Mux, 2 Sawy. 364, Fed. Cas. No. 16,268.

114 U. S. v. Villato, 2 Dall. 370, Fed. Cas. No. 16,622; Passenger Cases, 7 How. 283, 556; Golden v. Prince, 3 Wash. C. C. 313, Fed. Cas. No. 5,509. The early case of Collet v. Collet, 2 Dall. 294, Fed. Cas. No. 3,001, holding the contrary opinion, has long since been discredited.

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is the act by which, in pursuance of lawful authority, he is invested with the rights, privileges, and immunities belonging to the natural born citizen. The propriety of confiding the power of naturalization to the national government exclusively is supported by several obvious reasons. In the first place, our foreign intercourse is committed to the federal government exclusively, and as it is one of the privileges of American citizens to claim the protection of that government against all aggressions upon their rights by foreign powers or their agents, it is peculiarly the province of the United States to determine who are the persons entitled to that character. Again, under the constitution the citizens of each state are entitled to all the privileges and immunities of citizens in all the other states. And if each state enjoyed the power of investing whomsoever it might choose with the character of citizenship, it could grant to any class or race of foreigners all the rights and privileges in other states which those states would be able to confer upon the persons of their own choice, thus introducing an element of intolerable discord. And further, any one state or district would be able to obtain great and unfair advantages over another by inducements held out to foreigners in easier measures of naturalization and shorter terms of probation.[115]

But while the states are thus prohibited from granting naturalization, it does not follow that they may not legislate on the subject of aliens and their rights and disabilities. For example, each state may grant to aliens the privilege of holding and transmitting real estate within its limits, or it may withhold this right. Again, the state may confer upon an alien, after he has resided a certain length of time within its borders, or on other conditions, the right of suffrage. And hence follows a curious anomaly in our laws. For it must be observed that the constitution of the United States does not confer the right of voting upon any one. Neither does it declare that voters for federal officers must be citizens of the United States, nor prescribe any qualification for those who shall be entitled to participate in federal elections other than that they "shall have the qualifications requisite for electors of the most numerous branch of the state legislature."[116] As a result, it is entirely possible for a state to confer

[115] Pom. Const. Law, § 386. [116] Const. U. S. art. 1, § 2.

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upon a person such rights and qualifications as will entitle him to vote for representatives in congress, and for the members of the legislature which will elect United States senators, and even for the members of the electoral college which will choose the President, while nevertheless, for all purposes of federal jurisdiction and federal law, he remains as much an alien as if he had never set foot in the United States.[117] And this state of affairs actually exists in some of the western states.

In this sense and to this extent, the state can invest aliens with the privileges of its own citizenship. But it cannot make them citizens of the United States. Nor can it make them "citizens of a state" in any complete sense. Whatever rights and immunities it may confer upon them must be restricted to its own territory and its own laws. Thus the individual states, in dealing with the status of the alien, cannot grant to him those privileges and immunities which the constitution guaranties and secures to the "citizens of each state" to be enjoyed in all the other states.[118]

Naturalization may be effected in at least four ways. First, by the grant of the privilege to certain named individuals. Second, under general laws of which any person who fulfills the requisite conditions may avail himself.[119] Third, when the United States acquires territory formerly belonging to a foreign power, with its people, the latter thereupon become citizens of the United States. This was the case with the inhabitants of Florida, upon its cession by Spain to the United States.[120] Fourth, there may be a collective

[117] 1 Hare, Am. Const. Law, 521; Pom. Const. Law, §§ 208–210; Minneapolis v. Reum, 6 C. C. A. 31, 56 Fed. 576.

[118] Scott v. Sandford, 19 How. 393; Lanz v. Randall, 4 Dill. 425, Fed. Cas. No. 8,080.

[119] If a widow and her infant son, who are citizens of a foreign country, come to this country, and she marries a naturalized citizen of the United States, she thereby becomes a duly-naturalized citizen, and her son also thereby becomes a citizen. U. S. v. Kellar, 11 Biss. 314, 13 Fed. 82. The infant children of aliens, though born out of the United States, if dwelling within the United States at the time of the naturalization of their parents, become citizens by such naturalization. West v. West, 8 Paige, 433.

[120] "The inhabitants of territory ceded from one government to another are collectively naturalized, and have all the rights of natural-born subjects by mere force of the cession of the soil, without the necessity of anything

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naturalization upon the admission of a territory to statehood, including all those who are resident in the territory and included in the new political community, but who were not previously citizens of the United States.[121]

Congress has seen fit to restrict the privilege of naturalization. It is not accorded to aliens of all nations and races, but only to "aliens being free white persons, and to aliens of African nativity and persons of African descent."[122] Under this law, a native of China, of the Mongolian race,[123] or a native of the Sandwich Islands, belonging to the Hawaiian race,[124] is not entitled to become a naturalized citizen of the United States.

Bankruptcy.

The power of congress to enact uniform laws on the subject of bankruptcies does not deprive the states of the power to pass laws dealing with the same subject when there is no national bankrupt law in existence. But as soon as congress adopts a measure of this character, all the state laws relating to bankruptcy or insolvency are thereby superseded and suspended until the national law shall be repealed.[125] State laws, when lawfully in force, are subject to the limitation that they cannot affect debts previously contracted (since that would have the effect to impair the obligation of contracts) and that they have no application to non-resident creditors, unless it be with their own consent.[126] But since there is noth-

being expressed to that effect. Thus, all persons who were citizens of Texas, at the date of annexation, became citizens of the United States by virtue of the collective naturalization effected by the joint resolution of congress of March 1, 1845, although no allusion to citizenship is found therein." Opinions of the Justices, 68 Me. 589.

[121] Boyd v. Nebraska, 143 U. S. 135, 12 Sup. Ct. 875.

[122] Rev. St. U. S. § 2169. A person of half white and half Indian blood is not a "white person" within the meaning of the naturalization laws. In re Camille, 6 Sawy. 541, 6 Fed. 256.

[123] In re Hong Yen Chang, 84 Cal. 163, 24 Pac. 156; In re Ah Yup, 5 Sawy. 155, Fed. Cas. No. 104; In re Look Tin Sing, 21 Fed. 905; In re Gee Hop, 71 Fed. 274.

[124] In re Kanaka Nian, 6 Utah, 259, 21 Pac. 996.

[125] Sturges v. Crowninshield, 4 Wheat. 122; Ogden v. Saunders, 12 Wheat. 213; Baldwin v. Hale, 1 Wall. 223.

[126] Gilman v. Lockwood, 4 Wall. 409; Brown v. Smart, 145 U. S. 454, 12 Sup. Ct. 958; Hempsted v. Bank, 78 Wis. 375, 47 N. W. 627.

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ing in the federal constitution to prohibit congress from passing laws impairing the obligation of contracts, it is universally conceded that a national bankrupt law, though it includes such features, with provisions compulsory upon creditors, is valid and constitutional.[127] In fact, the power of congress over the subject of bankruptcy is subject to no other restriction than the requirement that its laws shall be uniform. It is not to be gauged or limited by the British statutes of bankruptcy which were in force in 1787. Although by those statutes, as then in force, the bankruptcy laws applied only to persons engaged in trade, congress is not obliged to limit its laws on the subject of bankruptcy to traders.[128] "The power under this clause is sufficiently comprehensive to enable congress to adopt a uniform system of bankruptcy, commit its administration to such of the courts of the United States as it might choose, and to provide the modes of procedure, special or otherwise, as they might, in their discretion, deem best adapted to secure and accomplish the objects of the act; and if such proceedings should differ from those in ordinary cases and suits, they would, notwithstanding, be obligatory upon the courts, as congress has, by the constitution, plenary authority over that subject."[129] A provision in a bankruptcy law allowing an exemption to the extent of the exemption allowed by the laws of the state in which the bankrupt resides, is not obnoxious to the requirement that such laws shall be "uniform."[130] Thus far in our history, this power of congress has been exercised three times, but only for a brief period in each instance. The bankruptcy law of 1800 was repealed in 1803. That of 1841 was repealed in 1843. That of 1867 was repealed in 1878.

Standard of Weights and Measures.

The authority given to congress to fix the standard of weights and measures is another illustration of the powers which were deemed proper to be confided to the national legislature for the sake of

[127] Evans v. Eaton, Pet. C. C. 322, Fed. Cas. No. 4,559; In re Owens, 12 N. B. R. 518, Fed. Cas. No. 10,632; Keene v. Mould, 16 Ohio, 12; Morse v. Hovey, 1 Barb. Ch. (N. Y.) 404.

[128] Kunzler v. Kohaus, 5 Hill (N. Y.) 317.

[129] Goodall v. Tuttle, 3 Biss. 219, Fed. Cas. No. 5,533.

[130] Dozier v. Wilson, 84 Ga. 301, 10 S. E. 743; Darling v. Berry, 4 McCrary, 470, 13 Fed. 659.

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securing uniformity and on account of their relation to trade and commerce. So far, however, nothing has been done by congress in the execution of this power, except to provide a standard troy pound for the regulation of the coinage, and to pass a permissive statute for the use of the metric system throughout the United States, and to enact a law defining and establishing the units of electrical measure (the ohm, ampere, volt, coulomb, farad, etc.) in accordance with the standards generally adopted by international agreement of electricians.[181] In the mean time, and until congress shall act, each state has the right and power to adopt its own standard for the regulation of weights and measures.[182] But if congress should at any time proceed to adopt a uniform national system, all state laws, in so far as they might be inconsistent therewith, would be suspended and superseded.

Punishment of Counterfeiting.

The power of congress to "provide for the punishment of counterfeiting the securities and current coin of the United States" would naturally flow, says Story, "as an incident from the antecedent powers to borrow money and to regulate the coinage, and indeed, without it, those powers would be without any adequate sanction."[183] The "securities" here mentioned might be extended so as to include all instruments by which the rights and interests of the general government are secured. But the context and the peculiar language used show that the word is to be restricted to the evidences of indebtedness which the United States may have issued in pursuance of its power to borrow money. The bonds, treasury notes, certificates, and other written promises issued by the United States are within the class to which the term may properly be applied.[184] Since the grant of a greater power always includes the less, it is within the authority of congress to provide for the punishment, not only of making counterfeit coin, but also of passing counterfeit money, of having it in possession with intent to pass it, and of bringing it into the United States with intent to

[181] 28 Stat. 101 (Act July 12, 1894).
[182] Weaver v. Fegely, 29 Pa. St. 27.
[183] 2 Story, Const. § 1123.
[184] Pom. Const. Law, § 417.

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pass it.[125] Congress has provided severe laws against the counterfeiting of the coin or notes of the United States, and against mutilating, scaling, or debasing the coinage, making such offenses crimes and visiting them with heavy penalties.[126]

But this power vested in congress does not preclude a state from passing a law to punish the offense of circulating counterfeit coin of the United States. While congress has exclusive authority to define and punish the crime of making or producing counterfeit coin, the states may validly enact laws against the passing or uttering of counterfeits, or against having in possession tools or implements intended for use in counterfeiting. The reason is that the former act is an offense against the United States alone; but the states have the right to punish for the fraud and wrong done by one who knowingly imposes upon his fellow citizens with false and worthless imitations of money.[127] And it has been held that the state courts, as well as the federal courts, have jurisdiction to try persons charged with making counterfeit money.[128] Inasmuch as the general government is bound to protect to other nations the rights secured to them by the law of nations, congress also has the power to enact laws punishing the counterfeiting of foreign securities.[129]

The Postal System.

Under the articles of confederation, congress was invested only with the power of establishing and regulating post-offices "from one state to another" throughout the United States, and exacting such postage on the papers passing through the same as might be requisite to defray the expenses of the said office. The inadequacy of this provision was very apparent, and the larger grant of power

[125] U. S. v. Marigold, 9 How. 560. "A counterfeit coin is one made in imitation of some genuine coin. It is not necessary that the resemblance should be exact in all respects. The resemblance is sufficient if the coins are so far alike that the counterfeit coin is calculated to deceive a person exercising ordinary caution and observation in the usual transactions of business, though the counterfeit would not deceive a person who was expert or had particular experience in such matters." U. S. v. Hopkins, 26 Fed. 443.

[126] Rev. St. U. S. § 5457 et seq.

[127] State v. Brown, 2 Or. 221.

[128] Sizemore v. State, 3 Head (Tenn.) 26; People v. White, 34 Cal. 183.

[129] U. S. v. Arjona, 120 U. S. 479, 7 Sup. Ct. 628; U. S. v. White, 27 Fed. 200.

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in the constitution was given because it was felt that the subject was national in its character, and that it could be properly regulated only by a uniform and exclusive system. The words of the grant are awkward and ill-defined. But they have been taken by common consent as intended to invest congress with the exclusive control over the entire postal system, with all its incidents and accessories. The power, as thus understood, includes the organization of the post-office department, the appointment of its numerous officers, the designation of the cities and towns in which local post-offices shall be established, the providing of suitable accommodations for the post-office in such places, either by renting, buying, or building houses, the determination of the routes over which the mails shall be carried, the making of contracts for the transportation of the mails by railroads, steamboats, or other carriers, the purchase of the numerous supplies of every sort needed for the business of the post-office, the manufacture of stamps, and the definition and punishment of crimes which tend to defeat the operations of the government under this power, or endanger the security of the mails. Laws have been passed for the punishment of the crimes of robbing the mails, injuring or destroying mail matter, secreting or embezzling letters containing valuables, stealing or fraudulently obtaining mail matter, receiving stolen articles from the mail, stealing post-office property, injuring mail bags, stealing or forging mail locks or keys, etc.[140] Also it is enacted that "any person who shall knowingly and willfully obstruct or retard the passage of mail, or any carriage, horse, driver, or carrier carrying the same, shall, for every such offense, be punishable by a fine of not more than $100."[141]

It is also a part of the policy of the government with reference to the postal system to establish a monopoly in the government in the carriage of mail, and to prevent its transportation by private enterprise for hire. There can be no doubt of the constitutional validity of acts of congress passed in furtherance of this purpose. "No government has ever organized a system of posts without securing to

[140] Rev. St. U. S. §§ 5466-5480.

[141] Rev. St. U. S. § 3995. A state statute which unnecessarily interferes with the speedy and uninterrupted carriage of the United States mails cannot be considered a reasonable police regulation. Illinois Cent. R. Co. v. Illinois, 163 U. S. 142, 16 Sup. Ct. 1096.

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itself, to some extent, a monopoly of the carriage of letters and mailable packets. The policy of such an exclusive system is a subject of legislative, not of judicial, inquiry. But the monopoly of the government is an optional, not an essential, part of its postal system. The mere existence of a postal department of the government is not an establishment of the monopoly. When it is legislatively established, it may include one or more without embracing all of the subjects of the government's postal arrangements. The business of private carriers of letters and mailable packets, even on principal mail routes, is lawful unless legislatively prohibited."[142]

The interpretation of the word "establish" in this grant of power has given rise to serious debates, the question being whether the authority of congress was limited to selecting existing highways or roads as the routes for the carriage of the mails, or whether it included power to build, or assist in the building of, highways and railroads to be used in the administration of the postal system. The discussion of this question would be too extensive for our present limits, and we shall be content with referring the reader to some of the principal authorities.[143]

By an act of congress, "the following are established post-roads: All the waters of the United States during the time the mail is carried thereon. All railroads or parts of railroads which are now or hereafter may be in operation. All canals, during the time the mail is carried thereon. All plank roads, during the time the mail is carried thereon. The road on which the mail is carried to supply any court-house which may be without a mail, and the road on which the mail is carried under contract made by the postmaster general for extending the line of posts to supply mail to post-offices not on any established route, during the time such mail is carried thereon. All letter-carrier routes established in any city or town for the collection and delivery of mail matters."[144] When a part of an established route is found to be impracticable, by reason of being almost or quite impassable, the post-office department may change that part without

[142] U. S. v. Kochersperger, 9 Am. Law Reg. 145, Fed. Cas. No. 15,541.

[143] See 2 Story, Const. §§ 1128–1150; 1 Kent, Comm. 267; U. S. v. Kochersperger, 9 Am. Law Reg. 145, Fed. Cas. No. 15,541.

[144] Rev. St. U. S. § 3964. As to letter-carrier routes, see Blackham v. Gresham, 16 Fed. 609; U. S. v. Easson, 18 Fed. 590.

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thereby creating a new route not authorized by law.[145] It is also held that the control of congress over the mails gives it a right to decide what matters shall be carried in the mails. And this right necessarily involves the right to determine what classes of matter shall be considered unmailable. Hence the act of congress prohibiting the use of the mails for the dissemination of advertisements or other papers relating to lotteries is within the power of that body and is not unconstitutional. And the same reasoning and conclusion apply to the statute which forbids the depositing in the mails of any obscene or indecent matter.[146] And under the same authority, the government has made it a punishable offense to use the mails for the purpose of defrauding others.[147]

Copyrights and Patents.

By the common law, an author has a right of property in his literary productions so long as he has not given them to the world, and he may restrain the publication of any of his literary work which he has never published or dedicated to the public, or recover damages for its unauthorized publication.[148] But the exclusive right to print, publish, and sell his works can be secured only by a copyright under the laws of the United States; and if he publishes anything without so protecting it, it becomes public property, and any person may republish it.[149] The control of congress over the copyright system is complete; it is subject to no restriction except that the grant of exclusive privileges to authors shall be only for a "limited time," and that its laws must be designed and calculated to "promote the progress of science and useful arts." The benefits of the copyright laws were at first restricted to citizens of the United States. But by the act now in force,[150] they are extended equally to foreigners, provided that their country accords a like reciprocity to American citizens and

[145] U. S. v. Barlow, 132 U. S. 271, 10 Sup. Ct. 77.

[146] Ex parte Jackson, 96 U. S. 727; In re Rapier, 143 U. S. 110, 12 Sup. Ct. 374; U. S. v. Bennett, 16 Blatchf. 338, Fed. Cas. No. 14,571.

[147] U. S. v. Wootten, 29 Fed. 702.

[148] Millar v. Taylor, 4 Burrows, 2303; Wheaton v. Peters, 8 Pet. 591; Clemens v. Belford, 14 Fed. 728; Press Pub. Co. v. Monroe, 19 C. C. A. 429, 73 Fed. 196.

[149] Clemens v. Belford, 14 Fed. 728.

[150] 26 Stat. 1106 (Act March 3, 1891).

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provided that the books to be protected must be printed from type set or plates made in this country.

The power of congress to make laws on the subject of patents is equally extensive with that over copyrights, and subject to the same and no other restrictions. It may pass general laws, applicable to all inventors who come within their terms, or it may enact a special law granting a patent to the heirs of an inventor,[151] or it may grant a patent to an inventor even though his invention is at the time publicly known, or grant an extension of a patent which has already expired.[152] The right of property created by a patent for an invention is not subject to the interference or control of the states. "If the laws of congress on the subject of patents were repealed, there would not exist any right to a patent; or, in other words, the inventor would not have any enforceable right of property in his invention or the fruits thereof. This right of property is created by the acts of congress, and state legislation does not deal therewith. Thus it is clear that the state legislature could not enact that none of its citizens should apply for and obtain a patent, unless he should apply for the same within six months, or any other time; and the right to protect the right of property created by the patent laws, by bringing an action at law or in equity, conferred by the act of congress, cannot be limited or affected by state legislation."[153] But letters patent granted by the United States do not exclude from the operation of the tax or license laws of a state the tangible property in which the invention or discovery is embodied.[154] And the states may make police regulations, relating to the sale and transfer of patented articles or patent rights, or even prohibiting the manufacture and sale of such articles, if the same shall be deemed injurious to the safety, health, or morals of the community.[155] The government of the United States has no right to use a patented invention without compensation to the owner of the patent.[156]

[151] Fire Extinguisher Manuf'g Co. v. Graham, 16 Fed. 543.

[152] Jordan v. Dobson, 4 Fish. Pat. Cas. 232, Fed. Cas. No. 7,519; Evans v. Jordan, 1 Brock. 248, Fed. Cas. No. 4,564.

[153] May v. Buchanan Co., 29 Fed. 469.

[154] Webber v. Virginia, 103 U. S. 344.

[155] Patterson v. Kentucky, 97 U. S. 501; In re Brosnahan, 18 Fed. 62; People v. Russell, 49 Mich. 617, 14 N. W. 568.

[156] James v. Campbell, 104 U. S. 356.

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The power here vested in congress gives it no authority to legislate for the protection of trade marks (a trade mark being neither an invention, a discovery, nor a writing, within the meaning of this clause of the constitution) except in so far as such legislation may be limited to the use of trade marks in foreign and interstate commerce.[157] But congress has power to extend the benefit of the copyright law to the author, inventor, designer, or proprietor of a photograph, so far as it is a representation of original intellectual conceptions.[158]

Establishment of Courts.

The power of congress to establish tribunals inferior to the supreme court has already been fully considered in connection with the subject of federal jurisdiction. Reference should here be made to the chapter dealing with that topic.

Definition and Punishment of Piracies.

The propriety, and even necessity, of confiding to congress alone the power to define and punish piracies and felonies committed on the high seas is to be deduced from the fact that the general government (and not the individual states) is the power which has control of our foreign relations, and to which other nations must look for co-operation in enforcing the rules of international law, as well as for the redress of injuries committed against that law. "Piracy is an assault upon vessels navigated on the high seas, committed animo furandi, whether the robbery or forcible depredation be effected or not, and whether or not it be accompanied by murder or personal injury. If a ship belonging to an independent nation, and not a professed buccaneer, practices such conduct on the high seas, she is liable to the pains and penalties of piracy."[159] Pirates may lawfully be captured on the ocean by the public or private ships of any nation, and this in time of peace as well as during a war; for they are the common enemies of all mankind, and, as such, are liable to the extreme rights of war.[160] But it should be noted that piracy

[157] Trade-Mark Cases, 100 U. S. 82; 21 Stat. 502.

[158] Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53, 4 Sup. Ct. 279.

[159] 1 Phillim. Int. Law, 379. "Piracy is robbery or a forcible depredation on the high seas, committed without lawful authority, and done animo furandi, and in the spirit and intention of universal hostility." 1 Kent, Comm. 183.

[160] The Marianna Flora, 11 Wheat. 1.

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according to the law of nations may mean one thing, and piracy according to the municipal law of a particular country another thing. Any nation may declare that certain acts shall be piracies (as against her laws) which would not be so by international law. This power to enlarge the scope of this crime has been given by the constitution to congress, and congress has exercised the power. It has not only made piracy according to the law of nations a crime against the United States, but has also included in the crime of piracy several things which would not be included by international law. The acts of congress declare, in the first place, that "every person who, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found within the United States, shall suffer death." Then follows a more particular description of numerous acts which are to be deemed piracy, such as robbery on the high seas, or on shore by the crew of a piratical vessel, murder on the high seas, any act of hostility against the United States or against any citizen thereof under color of a commission from a foreign prince or state, and the slave trade.[161] The slave trade is not piracy by the law of nations.[162] But as congress has the power not merely to punish piracy, but also to define it, it is entirely competent for congress to enact that the traffic in slaves shall be deemed piracy and punished accordingly, as many other nations have done. But the federal courts have no jurisdiction of a murder committed by one foreigner on another foreigner, both being on board a foreign vessel.[163]

The term "high seas," as here used, means tide waters, below low water mark, which are without the territorial limits of the country, excluding those portions of the sea which lie infra fauces terrae, such as tidal rivers, bays, basins, harbors, roadsteads, and the like.[164]

This clause of the constitution also gives congress power to define and punish offenses against the law of nations. Illustrations of the exercise of this power are to be found in the "neutrality laws," which forbid the fitting out and equipping of armed vessels,

[161] Rev. St. U. S. §§ 5368-5382.

[162] The Le Louis, 2 Dod. 210; The Antelope, 10 Wheat. 66.

[163] U. S. v. Furlong, 5 Wheat. 184.

[164] U. S. v. Grush, 5 Mason, 290, Fed. Cas. No. 15,268; U. S. v. Ross, 1 Gall. 624, Fed. Cas. No. 16,196.

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or the enlisting of troops, for either of two belligerent powers with which the United States is at peace; and again, in the laws which prohibit the organizing within the country of armed expeditions against friendly nations.[165]

War Powers—Power to Declare War.

The constitution confers upon congress the power to "declare war." This is the formal method of inaugurating hostilities against a foreign nation. But a war may be commenced, prosecuted, and terminated without any actual declaration of war by either of the belligerents.[166] And therefore congress also has the authority, instead of formally declaring war, to recognize the existence of actual hostilities and declare that a war in fact exists. The power to declare war necessarily includes the authority to prosecute the war, and make it effective, by all and any means, and in every manner, known to and exercised by any independent nation under the rules and laws of war as the same are ascertained by the principles of international law. For instance, the property of aliens found in the United States, at the commencement of hostilities with a foreign power, may be condemned as enemies' property and confiscated; but not without a legislative act authorizing its confiscation, and an act of congress declaring war is not such an act.[167] Contracts entered into during the late war between parties, the one residing within the military lines of the United States and the other within the Confederate lines of military occupation, are absolutely void, and no action could be maintained to enforce them.[168]

Same—Armies.

The constitution provides that congress shall have power to "raise and support armies, but no appropriation of money to that use shall be for a longer term than two years." This clause of the consti-

[165] Pom. Const. Law, § 423.

[166] The Eliza Ann, 1 Dod. 244. A state of actual war may exist without any formal declaration of it by either party; and this is true of both a civil and a foreign war. Prize Cases, 2 Black, 635. No formal declaration of war by congress, nor proclamation by the president, is necessary to define and characterize an Indian war. It is sufficient that hostilities exist and military operations are carried on. Marks v. U. S., 28 Ct. Cl. 147.

[167] Brown v. U. S., 8 Cranch, 110.

[168] Noblom v. Milborne, 21 La. Ann. 641.

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tution was bitterly opposed in the states before the adoption of the instrument. This opposition sprang from the jealousies of the states and from the extreme apprehension lest the grant of such a power might be the means of putting the whole country under a military domination or the rule of a standing army, and so imperiling or destroying the rights and securities of private persons. The influence of these fears is seen in the peculiar way in which the war powers were limited and distributed in the constitution as it stands. The President is the commander in chief. But congress is to raise and support the armies and appropriate what may be necessary for their maintenance. There can therefore be no danger that the executive might maintain a standing army of greater numbers or for a longer time than should seem to the people's representatives in congress to be consistent with the safety and good government of the country. But not even congress is wholly trusted in this respect. For no such appropriations shall be for a longer term than two years. It is therefore always in the power of the people themselves, at every change in the house of representatives, to dictate the policy of the government in regard to the army and its maintenance.

Congress is invested with power to "raise" armies. The means or methods of so doing are not prescribed, and therefore the natural inference is that the federal authorities may resort to any and all means of raising troops which the exigencies of the particular occasion may seem to require, or to such general plans as shall seem to them to be sufficient and effective. Congress may undoubtedly provide for the voluntary enlistment of men into the regular army of the United States, prescribing their term of service and all other matters relating to the duties and engagement of the enlisted man.[169] If it shall seem necessary or proper, the same body may offer inducements, such as bounties or pensions, to enter the military service. In time of war, especially if it is of serious magnitude, the method of replenishing the ranks of the army by voluntary enlistments will generally be found insufficient. In that event, congress, under the general power to raise armies, unlimited as we have said in respect to the means, may resort to conscription or a draft. This was done during the late civil war, and though the validity of the draft laws

[169] In re Grimley, 137 U. S. 147, 11 Sup. Ct. 54.

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was sometimes questioned, it was never authoritatively denied.[170] The power to raise armies also includes the right to determine the number of men who shall compose the army, and the method of their apportionment to the different arms of the service, and their organization into divisions, brigades, regiments, and companies. No limitation is found in the constitution as to either the number of the forces or the age or qualification of the men. This is left entirely to the wisdom and discretion of congress.

The power to "support" the army is equally general in its terms. It authorizes the appropriation and expenditure of money by congress, not only for the pay, transportation, rations, and clothing of the troops, but also for the purchase or manufacture of arms and ammunition, for the maintenance of a medical corps, for the construction and maintenance of forts, arsenals, barracks, and fortifications of all kinds, and for the establishment and maintenance of schools for the instruction and training of officers or of those who are destined to become officers. It has also been thought to justify the construction of military roads, or the creation or purchase of facilities for the rapid mobilization and transportation of troops in case of need. Under this power also congress has created and maintains the department of war, with all its numerous retinue of officers and clerks, and its varied and important duties and functions.

Same—Government of the Forces.

The power of congress to "make rules for the government and regulation of the land and naval forces" gives it the authority to ordain and establish what is called military law, that is, a system of general orders and regulations for the organization, discipline, and government of the army and navy. This includes the power to define offenses against the military law and against the good order and government of the forces, and to provide for the trial of such offenses by courts-martial, and to prescribe the punishments to be inflicted.

[170] The practice of impressing seafaring men for service in the English navy was recognized as permissible at common law, and was valid and legal provided the persons impressed were proper objects of the law, and those employed in the service were armed with a proper warrant. Rex v. Broadfoot, 18 How. St. Tr. 1323; Ex parte Fox, 5 Durn. & E. 276. No such practice is permissible in this country.

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Proceedings in such courts are not required to be commenced by indictment; for the fifth amendment excepts from its provisions "cases arising in the land and naval forces or in the militia when in actual service."

Same—The Militia.

Congress has power to "provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions." It may also "provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by congress." It will be perceived that there are no militia of the United States here provided for, and that the militia of the states are left very much to the government and control of their respective states. Congress may indeed call forth the militia, but only for specified purposes and under certain conditions. They may be enrolled in the service of the United States, and so become subject to the general military law, but only for the purposes mentioned, and even then the appointment of the officers is left to the states. Congress may provide for the organization and discipline of the militia. But if congress does not provide a general system for this purpose, it remains competent for the individual states to take such action in regard to the organization and governance of their militia as they shall deem best. And even when congress has prescribed a discipline, the authority of training the militia in accordance therewith remains in the states. The power over the militia thus reserved to the states is so complete that a state may, unless restrained by its own constitution, enact laws to prevent any body of men whatever, other than the regular militia of the state and the military forces of the United States, from associating themselves together as a military company or organization, or drilling or parading with arms within the state, unless with the governor's consent.[171] But when the militia force is actually employed in the service of the United States, it is subject to the control of congress in all particulars the same as the regular army. Thus the

[171] Presser v. Illinois, 116 U. S. 252, 6 Sup. Ct. 580.

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officers, though appointed by the states, are subject, in this case, not only to the orders of the President as commander in chief, but also to those of any officer outranking their own who may, under the authority of the President, be placed over them. Congress may provide for calling forth the militia. And this is held to give congress the power to confer the power of calling them forth, under certain circumstances, on the President, as was done by the act of 1795, which is still in force.[172] The militia cannot be called forth to do service out of the limits of the United States. For the laws of the Union can be executed only on its own soil, and there can be no invasion or insurrection beyond those limits. But it is now agreed that there is nothing to prevent the militia, when duly called forth on a proper occasion, from being sent outside of their own states in the service of the general government. A state may lawfully provide that persons belonging to the militia and called forth under the authority of the United States, who neglect or refuse to obey the call, shall be tried by a state court-martial and punished according to state laws.[173]

Same—Letters of Marque.

A letter of marque is a commission given to a private ship by a government to make reprisals on the ships of another government. The power to grant letters of marque is incidental and implied in the power to declare war. But it is also sometimes resorted to, not as a measure of hostility, but rather as a peace measure, and is intended to prevent the necessity of other or more extreme acts of hostility. It was therefore properly specified as one of the enumerated powers of congress, instead of being left to be inferred from the more general grant of authority to declare war. In 1857, at the close

[172] Martin v. Mott, 12 Wheat. 19; In re Griner, 16 Wis. 423. These doctrines were not always admitted by the states. Thus, in 8 Mass. 548, we find an opinion of the supreme court of that state to the effect that the commanders in chief of the militia of the several states have the right to determine whether any of the exigencies contemplated by the federal constitution exist, so as to require them to place the militia or any part of them in the service of the United States at the request of the President, to be commanded by him pursuant to the acts of congress; and that, when such exigency exists, the militia so employed cannot be commanded by any other officers than their own, save only the President.

[173] Houston v. Moore, 5 Wheat. 1.

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of the Crimean war, the congress of plenipotentiaries from the powers which had been engaged in the conflict issued what was called the "Declaration of Paris," prescribing certain rules as to the conduct of war and the protection of neutrals and their property. The first article of this declaration is: "Privateering is and remains abolished." To this declaration most of the great European powers have subscribed, accepting its terms as a part of the international law by which they are to be governed. But the United States has never given its adherence. And it is a serious question whether it would be within the power of congress, or of the President and senate by treaty, to accede to this declaration. For that would amount to a deliberate surrender of a portion of the power confided to congress by the constitution. Whether it could be placed forever in abeyance, so that no future congress could exercise the right to commission privateers, without an amendment to the constitution, is at least very doubtful.

Government of Ceded Districts.

Soon after the formation of the federal government, the cession of territory, to constitute the seat of government, contemplated by this clause of the constitution, was made by the states of Maryland and Virginia. The tract thus acquired by the national government was at first called the "Territory of Columbia," but afterwards received the name which it now bears, "The District of Columbia." The portion granted by Virginia was afterwards retroceded to that state by the United States, so that the District, as at present constituted, lies wholly within the exterior boundaries of the original state of Maryland. For some time the District was under a territorial form of government, but this was afterwards abolished, and it is now only a municipal corporation.[174] The local laws of the two states making the cession, existing at that time, were held to remain in force, in so far as they affected rights of property, and until they were changed by congress.[175] But congress has now covered almost the entire field of civil and criminal legislation, by statutes enacted expressly for the District, and but small traces of the original laws of Maryland now remain in force.

[174] Metropolitan R. Co. v. District of Columbia, 132 U. S. 1, 10 Sup. Ct. 19.

[175] Thaw v. Ritchie, 136 U. S. 519, 10 Sup. Ct. 1037.

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Since the constitution invests congress with the exclusive power of legislation for this District, evidently intending that it should act as the local legislature of the District, it has been very seriously questioned whether it was within its lawful power to delegate this authority by the creation of a territorial government, or whether it could ever again lawfully erect a law-making body for the District, at least to the extent of granting to it general legislative authority.[176] It will be perceived that, in respect to the District of Columbia, congress is invested with a double measure of power. The District is a part of the United States, and consequently all acts of congress which it has the power to ordain, as legislating for the United States, have force, so far as they are applicable, in the District. But the power of exclusive legislation over this territory also invests the national legislature with all the authority to make local rules and regulations which is possessed by the legislature of a state in respect to its own citizens. It must not be supposed, however, that in dealing with the District, congress is restricted in the same manner as the legislature of a state. For example, the power of "exclusive legislation" includes the power to tax. But it is not to be supposed that congress, in laying taxes in the District of Columbia, is territorially restricted as is the legislature of a state. That is, to justify such taxation, it is not required to be for district purposes only, but may be for any or all of the purposes for which congress may lawfully exercise the power of taxation. In other words, the general power of congress to lay and collect taxes extends to all places over which the government of the United States extends, and to the District of Columbia and all the territories, as well as to the organized states, and consequently direct taxes may be apportioned among the territories and the District, as well as among the several states.[177] And as the United States possesses not only political, but also municipal, authority over the District, it has the right to condemn lands lying within the District for a public park.[178]

[176] Roach v. Van Riswick, McArthur & Mackey (D. C.) 171.

[177] Loughborough v. Blake, 5 Wheat. 317. See, also, Cohens v. Virginia, 6 Wheat. 264, 424; 2 Story, Const. § 1226.

[178] Shoemaker v. U. S., 147 U. S. 282, 13 Sup. Ct. 361.

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After the cession of territory by a state to the United States, the municipal laws of the state governing property and property rights continue in force in the ceded territory, except so far as they may conflict with the laws and regulations of the United States applicable thereto; but the criminal laws of the state cease to be of force within the ceded district. "After a state has parted with its political jurisdiction over a given tract of land, it cannot be said that acts done thereon are against the peace and dignity of the state, or are violations of its laws; and the state certainly cannot claim jurisdiction criminally by reason of acts done at places beyond, or not within, its territorial jurisdiction, unless by treaty or statute it may have retained jurisdiction over its own citizens, and even then the jurisdiction is only over the person as a citizen." [178] But this provision of the constitution does not apply to land ceded by a state, but not purchased by the United States. The state, in such case, while granting exclusive jurisdiction, may reserve the right to tax private property within the district ceded.[179]

As to the limitations upon the power of congress in legislating for the District of Columbia and other ceded places, they must be sought alone in the constitution; there are no others. And these limitations, so far as concerns private and political rights, are found in the

[178] In re Ladd, 74 Fed. 31.

[179] Where the United States acquires lands within the limits of a state by purchase, with the consent of the legislature, for the erection of forts, dock-yards, arsenals, etc., the constitution confers upon the general government exclusive jurisdiction of the tract so acquired. But when it acquires such lands in any other way than by purchase with the legislative consent, the exclusive jurisdiction of the United States is confined to the land and buildings used for the public purposes of the general government. A state may, for such purposes, cede to the United States exclusive jurisdiction over a tract of land within its limits in a manner not provided for in the constitution, and it may prescribe conditions to the cession, if they are not inconsistent with the effective use of the property for the purposes intended. And if a state thus ceding to the United States exclusive jurisdiction over a tract within its limits, reserves to itself the right to tax private property therein, the acceptance of the grant, without dissent by the United States, will imply its consent to the reservation. Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, 5 Sup. Ct. 995; Chicago, R. I. & P. Ry. Co. v. McGlinn, 114 U. S. 542, 5 Sup. Ct. 1005; Benson v. U. S., 146 U. S. 325, 13 Sup. Ct. 60; Palmer v. Barrett, 162 U. S. 399, 16 Sup. Ct. 837; In re Kelly, 71 Fed. 545.

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first eight and the last three amendments to the constitution. The provisions guarantying trial by jury, for instance, are applicable to the District, and cannot be violated by congress.[181]

Acquisition of Territory.

The power of congress to acquire new territory, either by conquest, purchase, or annexation, was much debated at the time of the acquisition of Louisiana from France, in 1803, and in a less degree in connection with the purchase of Florida and of Alaska. It has now come to be recognized and established, rather by precedent and the general acquiescence of the people, than by any strict constitutional justification. In fact, the power cannot be derived from any narrow or technical interpretation of the constitution. But it is necessary to recognize the fact that there is in this country a national sovereignty. That being conceded, it easily follows that the right to acquire territory is incidental to this sovereignty. It is, in effect, a resulting power, growing necessarily out of the aggregate of powers delegated to the national government by the constitution. And if a more positive justification is needed, it may be said that whereas congress has power to make war, it has also the power to acquire territory by conquest; and that since the President and senate possess the power to make treaties with foreign nations, this may be understood as including the right to deal, by treaty, with all the subjects which come within the scope of the negotiations of independent sovereignties.[182]

An act of congress passed in 1856,[183] declared that guano islands taken into possession and occupation by American citizens, might be declared by the President to be "appertaining to the United States." In regard to this statute, the supreme court has recently declared that "by the law of nations, recognized by all civilized states, dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest; and when citizens or subjects of one nation, in its name, and by its authority or assent, take and hold actual, continuous, and useful possession (although only for the purpose of carrying on a particular business, such as catching and

[181] Callan v. Wilson, 127 U. S. 540, 8 Sup. Ct. 1301.

[182] 2 Story, Const. §§ 1282–1288; American Ins. Co. v. Canter, 1 Pet. 511, 542.

[183] Rev. St. U. S. tit. 72.

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curing fish, or working mines) of territory unoccupied by any other government or its citizens, the nation to which they belong may exercise such jurisdiction and for such period as it sees fit over territory so acquired. This principle affords ample warrant for the legislation of congress concerning guano islands."[184]

Disposition of Public Lands.

Over all the public lands of the United States congress exercises not merely jurisdiction, but also the rights of a proprietor. And under the grant of power to dispose of the territory of the United States, congress may dispose of the public lands as it may see fit. An elaborate system for the survey and sale of the public lands has been devised, and an important bureau of the Department of the Interior is charged with the administration of the laws relating thereto. Congress has passed numerous acts for the disposition of the public domain to actual settlers and purchasers. And it has also, at different times, made extensive grants to railroads or other works of internal improvement on a large scale, as also to educational institutions, and in some cases to the various states. All such acts are unquestionably within the authority of congress, as it possesses the jus disponendi of these lands.[185]

Government of the Territories.

The general and plenary control of congress over the territories arises not merely from the grant of power in the constitution to make needful rules and regulations respecting them, but also from the right of the national government to acquire territory, flowing from its power to declare war and make treaties. And this plenary control extends to the acts of territorial legislatures.[186] Subject to the limitations expressly or by implication imposed by the constitution, congress has full and complete authority over a territory,

[184] Jones v. U. S., 137 U. S. 202, 11 Sup. Ct. 80.

[185] U. S. v. Gratiot, 14 Pet. 526; Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. 548. The treaty-making power of the United States has authority to dispose of the public domain (as by treaty with an Indian tribe) without the consent or ratification of congress. Utah Min. & Manuf'g Co. v. Dickert & Myers Sulphur Co., 6 Utah, 188, 21 Pac. 1002.

[186] Late Corporation of Church of Jesus Christ v. U. S., 136 U. S. 1, 10 Sup. Ct. 792; U. S. v. Kagama, 118 U. S. 375, 6 Sup. Ct. 1109; American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 511.

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and may directly legislate for the government thereof. It may declare a valid enactment of the territorial legislature void, or a void enactment valid, although it reserved in the organic act no such power.[187] It may therefore be regarded as definitely settled that the power of congress over the territories will enable it either to make its own rules and regulations for their government, or to erect territorial forms of government, and invest them with such measure of legislative power as it may deem best. And this power is exclusive, and exempt from all interference or control by the states. "The contrary dogma," says Pomeroy, "that the inhabitants of a territory have the entire control of their own local concerns, and may form their own governments independently of the national legislature, never rose above the level of a mere party cry; it never obtained the assent of any department of the government, and it has been distinctly repudiated by the supreme court."[188]

"The government of the territories of the United States belongs primarily to congress, and secondarily to such agencies as congress may establish for that purpose. During the term of their pupilage as territories, they are mere dependencies of the United States. Their people do not constitute a sovereign power. All political authority exercised therein is derived from the general government. It is, indeed, the practice of the government to invest these dependencies with a limited power of self-government as soon as they have sufficient population for that purpose. The extent of the power thus granted depends entirely upon the organic act of congress in each case, and is at all times subject to such alterations as congress may see fit to adopt."[189] Congress "may legislate for the territory directly and in detail. It may confide the government of the same, with or without special limitation, to a council or commission of its own selection, or it may provide what is known as a 'territorial government,' in which the ordinary powers of legislation shall be confided to an assembly

[187] National Bank v. Yankton Co., 101 U. S. 129. "Action by congress in annulling territorial statutes is rare, and usually only takes place in cases where they are not void of themselves, but simply improper or inexpedient without being illegal per se. The usual way of declaring a territorial statute, which is inconsistent with the higher law of congress, inoperative, is through the courts, just as in the states similar enactments would be adjudged to be unconstitutional." In re Attorney General, 2 N. M. 49.

[188] Pom. Const. Law, § 403. [189] Snow v. U. S., 18 Wall. 317.

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chosen by the residents or some portion or class of them."[190] The latter system is the one now universally in force in the territories. An act of congress provides that "the legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States. But no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of nonresidents be taxed higher than the lands or other propery of residents."[191] "A rightful subject of legislation," it is said, "is a subject which, from the nature of things, the course of experience, the practice and genius of our government, properly belongs to the legislature to regulate and control, rather than to the judicial or executive departments of the government."[192] This grant of power to the territorial legislatures is sufficient to authorize them to levy and collect taxes, subject to the limitations above mentioned, to provide for the exercise of the power of eminent domain,[193] to pass laws restricting and regulating the sale of articles deemed injurious to the health or morals of the community,[194] or a local option law,[195] and to grant charters of incorporation.[196]

The organic act of a territory is equivalent to a constitution; it cannot be modified or controlled by the legislature of the territory.[197] And an act of the territorial legislature in violation of the organic act is null and void, unless congress affirmatively approves it. Then it would become part of the constitution of the territory, provided it was not in conflict with the federal constitution.[198] But "the territories being mere dependencies of the United States, exercising delegated powers, and their governments being temporary agencies employed by congress to aid in their government during the term of

[190] Nelson v. U. S., 30 Fed. 112; The Panama, Deady, 27, Fed. Cas. No. 10,702.

[191] Rev. St. U. S. § 1851.

[192] The Panama, Deady, 27, Fed. Cas. No. 10,702.

[193] Oury v. Goodwin (Ariz.) 26 Pac. 376.

[194] Territory v. Guyott, 9 Mont. 46, 22 Pac. 134.

[195] Territory v. O'Connor, 5 Dak. 397, 41 N. W. 746.

[196] Rogers v. Burlington, 3 Wall. 654.

[197] Hill v. Territory, 2 Wash. T. 147, 7 Pac. 68.

[198] Godbe v. City of Salt Lake, 1 Utah, 68.

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their pupilage, the capacity of their legislatures is regarded more rigorously by the courts, and their enactments construed less liberally, than the laws made by a sovereign, and they will be held void with less hesitation when they are clearly unreasonable, oppressive, and unjust." [199] The executive power of each territory is vested in a governor, who is appointed by the president, and holds his office for four years, unless sooner removed by the appointing power.[200]

According to the law of nations, rights of property are protected, even in the case of a conquered country, and are held sacred and inviolable when it is ceded by treaty, with or without any stipulation to that effect; and the laws, whether written or evidenced by the usages and customs of the conquered or ceded country, continue in force until altered by the new sovereign.[201] The government of the United States retains constitutional power to punish, through its courts, a crime committed against it in one of the territories, although such territory is admitted as a state pending the prosecution and before conviction.[202]

Same—The Northwest Territory.

This was the name given to the great stretch of territory ceded to the United States by Great Britain at the close of the revolutionary war. Out of it were afterwards formed the five states of Ohio, Indiana, Illinois, Wisconsin, and Michigan. In 1787, before the adoption of the constitution of the United States, the congress of the confederation framed an "Ordinance for the Government of the Northwest Territory," which is chiefly interesting to the student of constitutional law on account of the liberal provisions which it made for the security of civil, religious, and political liberty, and for the fact that it prohibited slavery and involuntary servitude, except as a punishment for crime, within the territory. This ordinance was not abrogated by the adoption of the federal constitution, but remained in force as the municipal law of the territory in so far as it was not inconsistent with the constitution.[203]

[199] People v. Daniels, 6 Utah, 288, 22 Pac. 159.
[200] Rev. St. U. S. § 1841.
[201] Strother v. Lucas, 12 Pet. 410.
[202] U. S. v. Baum, 74 Fed. 43.
[203] Spooner v. McConnell, 1 McLean, 337, Fed. Cas. No. 13,245.

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Admission of New States.

The establishment of a state constitution by the people of a territory, which is to be admitted into the sisterhood of states, is regularly accomplished in the following manner: First of all, it is for congress to decide whether the proposed new state shall be admitted. The people of a territory have no right, under any circumstances, to demand admission into the Union, in any such sense that the authorization of congress can be dispensed with. The power to admit new states is vested in congress exclusively. And the people of a territory cannot force their way into the Union by framing and adopting a constitution, electing state officers, and assuming to act as a state. Notwithstanding such action, if they had not the authorization of congress, they would remain a territory and still subject as such to the supervision of the national government. Congress, in its political capacity and as the general guardian of the nation, must then consider whether it is expedient that the territory be admitted as a state. But when it is decided to admit the new state, a statute is passed for that purpose, called an enabling act. It describes the boundaries of the new state, provides that the people may appoint a constitutional convention, prescribing the qualifications of the members thereof and the manner of their election, as well as the qualifications of those who are to be given the right to vote for them, provides that the convention so chosen shall proceed to frame a constitution, which shall provide for a government republican in form and not be repugnant to any provision of the national constitution, and which shall be adopted by the people, and then shall be submitted to congress for its approval, and enacts that upon such approval, the territory shall become and be a state of the Union. The enabling act may, and usually does, contain many other provisions, either as to the principles or contents of the new constitution, or as to matters between the new state and the Union which are deemed best settled upon the admission of the state. But the foregoing elements are those which alone are essential to it.[204] When the constitution thus framed is laid before

[204] It is entirely competent for congress, in giving its consent to the admission of a new state, to impose conditions which shall be binding and irrevocable. This may be done by requiring certain clauses to be inserted in the constitution of the new state, or by requiring its legislature to give

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congress, it is for that body to consider whether it has been properly adopted, and whether it is in conformity to the national constitution, and whether it contains those guaranties of private, social, and political rights which are secured to the citizens of the United States. If these facts are found in its favor, it is approved and thereupon comes into operation and effect as the constitution of the new state.

It will be noticed that while the constitution provides that new states may be admitted into the Union, it does not prescribe any rules as to the mode or manner of their admission. Consequently, this whole matter being within the control of congress, that body has the power not only to provide a method of establishing a new state, but also of condoning any omission or irregularity in the manner in which its authorization or its directions are carried out. If the people of a territory, without waiting for an enabling act, should meet in convention and frame and adopt a constitution, and present it to congress, and claim admission as a state, it is true, as already stated, that congress would not be compelled to accept their petition. But congress could do so, and no question as to the legality of the admission of the state could thereafter be raised. So, if the provisions of an enabling act should be disregarded or irregularly carried out, it would unquestionably be within the power of congress to waive the irregularity. Again, it is proper for congress, in considering a constitution framed in any of these modes, to accept it conditionally, if it shall find sufficient reason for such a course.

It is not to be supposed that the authority of congress, in this matter, was limited to that domain which belonged to the United

a formal assent to the stipulations made by congress. These conditions could not be abrogated or evaded by the new state, as, by the adoption of a new or amended constitution, at least in so far as they formed a compact with the general government or were in accordance with the terms of the federal constitution. Brittle v. People, 2 Neb. 198. The following may be mentioned as examples of conditions thus imposed: A requirement that the new state shall renounce all jurisdiction and right of taxation over the lands of the United States within its borders; that it shall cede certain territory to another state, or that a disputed boundary shall be settled in a particular way; that slavery shall not be permitted; that no invidious laws shall ever be passed against certain classes or races of people.

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States at the adoption of the constitution, or that territory newly acquired may not be erected into a state or states if it shall seem good to congress, or that it is necessary first to give a territorial form of government. Texas, for example, was not a part of the original United States. It was an independent republic at the time of its annexation. But it is not to be doubted that its admission into the Union was in all respects conformable to the constitution.

The constitution also provides that no new state shall be formed or erected within the jurisdiction of any other state without the consent of the legislature of the state concerned. The case of West Virginia constitutes an apparent violation of this rule. For it was formed out of the territory theretofore belonging to Virginia. But the doctrine on which this action was justified by the government was as follows: At that time the state of Virginia was in armed rebellion against the United States. Its government was insurrectionary. Its legislature, so far as concerned public acts, was unlawful. But the people occupying a part of its territory remained loyal to the United States. These people, with the consent of congress, might and did maintain a government loyal to the United States and in full constitutional relations with the general government. It was in the power of congress to recognize this loyal government as the rightful government of the state of Virginia. And such government could therefore give its consent to the erection of a new state, formed out of part of the territory of Virginia. The legislature of the new state, when established, could agree, by the consent of congress, with the government of the old state as to the terms and conditions of the partition. This doctrine has been accepted by the courts.[205]

IMPLIED POWERS.

105. The constitution, after enumerating certain powers vested in congress, provides that congress shall have power to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all

[205] Virginia v. West Virginia, 11 Wall. 39.

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other powers vested by this constitution in the government of the United States or in any department or officer thereof." This clause is the foundation of the doctrine of implied powers.

This clause, says Story, "neither enlarges any power specifically granted, nor is it a grant of any new power to congress; but it is merely a declaration for the removal of all uncertainty that the means of carrying into execution those otherwise granted are included in the grant. Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is whether the power be expressed in the constitution. If it be, the question is decided. If it be not expressed, the next inquiry must be whether it is properly an incident to an express power and necessary to its execution. If it be, then it may be exercised by congress. If not, congress cannot exercise it." [206] It would have been practically impossible to make this provision more explicit. The framers of the constitution might have attempted a positive enumeration of the powers comprehended under the terms "necessary and proper." But "the attempt would have involved a complete digest of laws on every subject to which the constitution relates. It must have embraced all future as well as all present exigencies, and have been accommodated to all times and all occasions and all changes of national situation and character. Every new application of the general power must have been foreseen and specified; for the particular powers, which are the means of attaining the objects of the general power, must necessarily vary with those objects, and be often properly varied, when the objects remain the same. Who does not at once perceive that such a course is utterly beyond human reach and foresight?" [207]

To recite all the various occasions on which congress has availed itself of this grant of incidental powers would amount to making a transcript of the federal statutes. But a few illustrations may profitably be introduced, in order to exhibit the practical working of the power. Almost the entire criminal jurisprudence of the United States is derived from this power. For the punishment of offenses against the revenue, against the postal service, perjury,

[206] 2 Story, Const. § 1243. [207] Id. § 1239.

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embezzlement, malfeasance in office, and many other felonies or misdemeanors, is necessary to secure the due and effectual operation of the laws made by congress in the exercise of its enumerated powers. The money powers of the federal legislature are held to give it the right to issue bonds and establish a system of national banks. Its power to regulate commerce invests it with authority to improve rivers and harbors, to maintain a coast survey, life-saving stations, and a naval observatory, to regulate the liabilities of ocean carriers and the charges of railroads, and to protect commerce against unlawful restraints and monopolies and illegal combinations and trusts. Its power to lay and collect taxes furnishes the authority for the establishment and maintenance of the whole elaborate system for the collection of the customs duties and internal revenue. Its authority to establish post-offices and post-roads includes the power to secure the passage of the mails from all obstructions or interruptions, to punish offenses against the postal laws, and to exclude lottery advertisements and indecent matter from the mails, and to grant to telegraph companies a right of way over the public domain. Wherever congress advances to fill the sphere of legislative jurisdiction confided to it by the great grants of the constitution, there advances with it the right and power to choose the means by which its laws shall be made effectual and which are appropriate to the ends it is designed to accomplish.[208]

But it has been contended that the choice of means or instrumentalities is not unrestricted. They must be "necessary" for carrying into execution the enumerated powers. The important word here, however, is relative, not absolute. The necessity required is not an imperative necessity. The constitution does not mean that the power to be exercised must be the only power which could by any possibility be resorted to for carrying the design of congress into execution. There may, for instance, be two or more methods of

[208] As an additional illustration of this doctrine, we may mention the act of congress prohibiting federal officers from giving, soliciting, or receiving contributions for political purposes. This statute is not unconstitutional. "The evident purpose of congress in all this class of enactments has been to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service. Clearly such a purpose is within the just scope of legislative power." Ex parte Curtis, 106 U. S. 371, 1 Sup. Ct. 381. See, also, Opinion of the Justices, 138 Mass. 601.

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accomplishing a given result. If the result must be accomplished, any one of these methods may properly be said to be necessary, although neither is absolutely necessary, since if one should fail the other would remain open and the result still be accomplished. The more liberal interpretation to be given to the word in this connection is shown by the use of the phrase "absolutely necessary" in that clause of the constitution which forbids the states to lay duties on imports or exports. This shows that the authors of the constitution were aware of the relative nature of the word "necessary," and did not intend to give it the most restrictive meaning in this part of the instrument. Moreover, it is here coupled with the word "proper." If the necessity intended were an absolute necessity, the addition of the word "proper" would be merely nonsensical. For imperativeness excludes all questions of propriety. But if we take the first word in a less restricted sense, the other may well be understood as requiring that the means chosen shall be actually appropriate to the ends in view. The result is that congress is invested with authority to avail itself of such means or agencies for carrying into effect its enumerated powers as shall be requisite, essential, or conducive to the accomplishment of that result and bona fide appropriate thereto. And of the existence of this kind of necessity, or of the conduciveness of the means to the end, congress is to judge in the first instance. Its decision is not conclusive. The courts may also determine the question when it is properly presented to them. But they will not set aside an act of congress as unconstitutional, on this ground, unless it is clearly apparent that the statute can by no means be needful or appropriate to the execution of any of the specified powers of the federal legislature. These principles are fully sustained by the decisions of the supreme court.[209]

It was on this ground that the constitutionality of the act incorporating the Bank of the United States was principally sustained. And the reasoning applies equally to other corporations. It is true that we cannot find in the constitution an express grant of power to congress to grant charters of incorporation. But if a

[209] McCulloch v. Maryland, 4 Wheat. 316; Martin v. Hunter, 1 Wheat. 304; Gibbons v. Ogden, 9 Wheat. 1; Hepburn v. Griswold, 8 Wall. 603; Legal Tender Cases, 12 Wall. 457; Juilliard v. Greenman, 110 U. S. 421, 4 Sup. Ct. 122; U. S. v. Coombs, 12 Pet. 72.

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bank, a railroad, a telegraph company, or any other kind of a corporation is a means or agency needed by congress in the exercise of its admitted powers, or conducive to their due execution, and plainly adapted to the accomplishment of that end, then congress has power, under this clause of the constitution, to incorporate it.[210]

LIMITATIONS ON POWERS OF CONGRESS.

106. The limitations upon the legislative power of congress, under the constitution, may be divided into four classes;—

(a) Implied limitations.

(b) General limitations.

(c) Specific limitations upon general powers.

(d) Specific limitations upon specific powers.

Implied Limitations.

Besides the restriction upon the legislative power of the United States growing out of the fact that it is a government of enumerated powers, which has been already adverted to, there are certain limitations upon legislative power in general, arising from the nature of government and the partition of powers among the several departments of the government, which are applicable to congress, as to any legislative body. These limitations are not expressed in the constitution, but they are none the less effective and binding. We have chosen to describe them as "implied limitations."

It is clear, in the first place, that congress cannot pass any law altering the form or frame of the government, curtailing the autonomy of the United States, or subjecting the government to the influence or ascendency of any foreign power.

Nor can it make exterritorial laws; that is, laws designed to operate beyond the boundaries or the jurisdiction of the United States.

Nor could it renounce or surrender any of the powers granted to it by the constitution, whether to the other branches of the government, the states, or private parties.

[210] McCulloch v. Maryland, 4 Wheat. 316; Osborn v. Bank of U. S., 9 Wheat. 738; Farmers' & Mechanics' Nat. Bank v. Dearing, 91 U. S. 29; 2 Story, Const. §§ 1259–1271.

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Nor could it legally encroach upon the province of either the executive or the judicial department of the government, or usurp the functions of either.

Nor can it delegate the powers confided to it, or authorize their exercise by any other body or any person.[211]

General Limitations.

The general limitations upon the power of the federal government are found in the ninth and tenth amendments to the constitution. In regard to the first of these, it has been said that it "was manifestly introduced to prevent any perverse or ingenious misapplication of the well-known maxim that an affirmation in particular cases implies a negation in all others, and, e converso, that a negation in particular cases implies an affirmation in all others. The maxim, rightly understood, is perfectly sound and safe; but it has often been strangely forced from its natural meaning into the support of the most dangerous political heresies."[212] The tenth amendment was adopted in consequence of the jealousies felt by the states with regard to the power of the central government, and was designed to make it more clear and certain that the government of the United States was one of delegated and enumerated powers. The force and applicability of this amendment are chiefly apparent when it is considered in connection with the grant to congress of power to "make all laws which shall be necessary and proper for carrying into execution" its enumerated powers. It should therefore be studied in relation to the doctrine of implied and incidental powers.

Specific Limitations upon General Powers.

The specific limitations upon the general powers of congress are mainly found in the first eight amendments to the constitution and in the last three. These constitute what may be called the federal

[211] An act of congress authorizing the secretary of war to make such rules and regulations as may be necessary to protect improvements on a navigable river, and providing that any violation of such rules shall be a misdemeanor, etc., is not invalid as conferring legislative authority on the secretary, as he is only authorized to make the rules, and it is the act of congress which declares the violation to be punishable. U. S. v. Breen, 40 Fed. 402. And see U. S. v. Ormsbee, 74 Fed. 207.

[212] 2 Story, Const. § 1905.

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bill of rights. They are intended to secure those personal, social, and political rights which are generally esteemed characteristic of a free country, against all abridgment or invidious legislation on the part of the national government. These are best considered in connection with the study of those rights, and will be found treated in the chapters on civil and political rights and the constitutional guaranties in criminal cases. But there are certain limitations of federal power, found in other parts of the constitution, which must be briefly noticed here, as belonging to this class. Thus, "the migration or importation of such persons as any of the states now existing shall think proper to admit shall not be prohibited by the congress prior to the year 1808." This obscure phrase was designed to secure the continuance of the African slave-trade until the year designated. Its insertion was necessary to secure the adoption of the constitution, and was one of the principal compromises of that instrument. As soon as the stipulated twenty years had elapsed, congress absolutely prohibited the further importation of slaves, and also made the slave-trade piracy and punishable with death. Again, "no money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time." In regard to this provision, it is well said by Story that "as all the taxes raised from the people, as well as the revenues arising from other sources, are to be applied to the discharge of the expenses and debts and other engagements of the government, it is highly proper that congress should possess the power to decide how and when any money shall be applied for these purposes. If it were otherwise, the executive would possess an unbounded power over the public purse of the nation, and might apply all its monied resources at his pleasure. The power to control and direct the appropriations constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public peculation." [218]

"No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, with-

[218] Id. § 1348. The subject of appropriations and the legislative control of the public money will be fully considered in a subsequent chapter. See infra, p. 314.

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out the consent of congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state." The clause which prohibits the granting of titles of nobility has but little significance at the present day. But it was once thought important, as a means of preserving the simplicity of republican institutions and policy, and was also deemed a valuable safeguard against the possible ascendency of powerful and ambitious families.[214] The same prohibition is also laid upon the states.

Specific Limitations upon Specific Powers.

These limitations have already been discussed in connection with the powers to which they relate, and it is only necessary here to enumerate them, for the purpose of giving a complete conspectus of the powers and restrictions of the national legislature.

Congress may alter the regulations made by the several states as to the time, place, and manner of holding elections for senators and representatives, except as to the places of choosing senators.

Congress has power to lay and collect taxes. But all duties, imposts, and excises shall be uniform throughout the United States, and no capitation or other direct tax shall be laid unless in proportion to the census or enumeration, and no tax or duty shall be laid on articles exported from any state.

Congress has power to regulate foreign and interstate commerce. But no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another.

It has the power to enact laws concerning naturalization and bankruptcy. But these must be uniform throughout the United States.

It has power to grant patents and copyrights. But these must be for limited times only.

It may constitute courts. But these must be inferior to the supreme court. In other words, congress can never strip the supreme court of its functions and prerogatives by creating another court with appellate jurisdiction over it.

[214] Congress has provided that in case an alien applying for naturalization has borne any hereditary title, or been of any of the orders of nobility, of the kingdom or state from which he comes, he must make an express renunciation of such title or order before being admitted to citizenship, which renunciation shall be recorded. Rev. St. U. S. § 2165.

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It has power to raise and support armies. But no appropriation of money to that use shall be for a longer term than two years.

It may provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States. But there is reserved to the states the appointment of the officers and the authority of training the militia according to the discipline prescribed by congress.

Congress has power to declare the punishment of treason. But no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

New states may be admitted by congress into the Union. But no new state shall be formed or erected within the jurisdiction of any other state, nor any state be formed by the junction of two or more states or parts of states, without the consent of the legislatures of the states concerned as well as of congress.

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CHAPTER IX.

INTERSTATE LAW AS DETERMINED BY THE CONSTITUTION.

107–109. General Principles.
110. Privileges of Citizens.
111. Public Acts and Judicial Proceedings.
112–115. Interstate Extradition.

GENERAL PRINCIPLES.

107. In all relations not regulated by the federal constitution, the several states of the Union occupy the position of independent powers in close alliance and friendship.

108. As between the several states, and their people, the principles of private international law apply with even greater force than as between the subjects of foreign nations.

109. In matters independent of the constitution, the principle of interstate comity must yield to the interests or the policy of the particular state.

If it were not for the provisions of the constitution of the United States, no state would be legally bound to give effect to the laws or institutions of another state within its own borders or in their application to its own citizens, or to recognize the judgments or decrees of the courts of another state as technically binding on its own courts, or to accord to the citizens of another state, when resident within its limits or there engaged in business, any greater rights or privileges than it might see fit to grant to citizens or subjects of foreign nations under like circumstances. In all the most fundamental particulars, this power to discriminate against each other is taken away from the states by the constitutional provisions which we are to consider in the following pages. But in all other matters, the several states, being foreign to each other, will apply the rules of private international law to questions concerning the property,

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rights, contracts, or actions of a citizen of one state projected over into another state. These rules, while recognized and enforced by the courts in the absence of any countervailing statute, yet rest on no firmer foundation than the principle of interstate comity, and must give way whenever they are found to be in conflict with the laws or policy of a state in the interests of its own people.[1]

PRIVILEGES OF CITIZENS.

110. By a provision of the federal constitution, the citizens of each state are entitled to all the privileges and immunities of citizens in the several states.

What Privileges Intended.

The supreme court of the United States has declared that it will not undertake to describe and define the rights and privileges of citizens under this clause in any general classification, preferring to decide each case which arises under this provision as it may come up.[2] It is evident, however, that the rights and privileges here intended are only such as belong to citizenship. And a more definite idea of the meaning of the clause may be obtained from a consideration of the purpose with which it was inserted in the constitution. This purpose was to prevent the states from making invidious discriminations against non-residents, and to promote the unification of the American people, by breaking down state lines, in respect to the enjoyment of social and business privileges and the favor and protection of the laws. Accordingly we may say that the "privileges and immunities" secured by this part of the constitution include protection by the government; the enjoyment of life and liberty, with the right to acquire, possess, and dispose of property of every kind, and to pursue and obtain happiness and safety, subject only to such restrictions as the government may justly prescribe for the general good; the right of a citizen of one state to pass freely into, through, and out of all the other states, or to reside in any other state, for the purposes of trade, professional pursuits,

[1] Shaw v. Brown, 35 Miss. 246; Donovan v. Pitcher, 53 Ala. 411.
[2] Conner v. Elliott, 18 How. 591.

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or otherwise; the right to claim the benefit of its laws, either as a protection against injustice or as a means of enforcing his rights in its courts; and the right to be exempt from all discriminations and from any higher taxes, impositions, or other burdens than are paid by the citizens of the state.[3] A statute which forbids the appointment of any non-resident of the state as trustee in a deed or mortgage or any other instrument except wills, and prohibits any such person so appointed from acting as such trustee, is unconstitutional, as infringing upon the constitutional rights of citizens of other states. For if the acquisition of property in trust could be denied to them, it would be equally possible to forbid them to acquire property in fee.[4]

What Privileges not Included.

This clause of the constitution does not confer upon the citizens of each state the right of voting, of being elected, or of holding office in the other states. These are political privileges which each state may justly reserve for its own citizens. But it would not be competent for the state to deny to non-residents the right to acquire citizenship among its own people, upon abandoning their former domicile, as a preliminary to exercising the right of suffrage.[5] Nor does this constitutional provision entitle the citizens of the various states to share in the common property of citizens of a particular state, e. g., the right of fishing in navigable waters of the state. It is not infringed by a state law confining the right of fishing in such waters to citizens of the state.[6] While a citizen of the United States not resident within the state cannot be denied access to the courts, a statute which restricts the right of commencing the process of foreign attachment to citizens of the state is not repugnant to this clause of the constitution.[7] Nor does it prevent the requirement that non-resident plaintiffs shall furnish security for costs in actions

[3] Corfield v. Coryell, 4 Wash. C. C. 371, Fed. Cas. No. 3,230; McCready v. Com., 27 Grat. 985; Ward v. Maryland, 12 Wall. 418, 430; Crandall v. Nevada, 6 Wall. 35.

[4] Roby v. Smith, 131 Ind. 342, 30 N. E. 1093.

[5] Campbell v. Morris, 3 Har. & McH. 535, 554.

[6] McCready v. Virginia, 94 U. S. 391; State v. Tower, 84 Me. 444, 24 Atl. 898.

[7] Kincaid v. Francis, Cooke (Tenn.) 49.

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commenced by them in the courts of the state.[8] Nor is a statute unconstitutional on this ground which authorizes actions to be begun against non-resident defendants by a constructive service of process by publication and the attachment of property within the jurisdiction of the court.[9]

Who are Citizens.

Since the constitution provides that the citizens of "each state" shall be entitled to these privileges and immunities, it may well be questioned whether citizens resident in the territories and the District of Columbia may claim the benefit of this clause. The same reason which excludes them from the right to sue citizens of the states in the federal courts would seem to be operative here. But the point has not been judicially decided. But it is settled that corporations are not citizens, within the meaning of this provision; it is intended to apply to natural persons only. Hence a state may lawfully either grant or refuse to foreign corporations the privilege of doing business within its limits, and if it accords the privilege, it may impose terms and conditions on its exercise.[10]

Discriminating Taxes.

A state statute imposing a license tax upon peddlers, salesmen, or traveling merchants, must not make any discrimination against citizens of other states, either by placing a heavier burden of taxation upon them than is borne by the citizens of that state, or by giving to its own citizens privileges which are not accorded to non-residents in the same line of business. If it does, it is obnoxious to the clause under consideration.[11] And any tax law of a state

[8] Holt v. Railroad Co., 81 Md. 219, 31 Atl. 809; Cummings v. Wingo, 31 S. C. 427, 10 S. E. 107.

[9] Reid v. Mickles (Tex. Civ. App.) 29 S. W. 563.

[10] Paul v. Virginia, 8 Wall. 168; Ducat v. Chicago, 10 Wall. 410; Liverpool Ins. Co. v. Massachusetts, Id. 566; Warren Manuf'g Co. v. Etna Ins. Co., 2 Paine, 501, Fed. Cas. No. 17,206; Pembina C. S. M. & M. Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737; Horn Silver Min. Co. v. New York, 143 U. S. 305, 12 Sup. Ct. 403; Slaughter v. Com., 13 Grat. 767; People v. Imlay, 20 Barb. 68; W. U. Tel. Co. v. Mayer, 28 Ohio St. 521; Fire Department v. Helfenstein, 16 Wis. 136; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 10 Sup. Ct. 958.

[11] Ward v. Maryland, 12 Wall. 418; McGuire v. Parker, 32 La. Ann. 832;

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which necessarily discriminates against the introduction and sale of the manufactures or products of another state or states, and in favor of the manufactures or products of its own citizens and against those of other states, is unconstitutional, for the same reason.[12]

PUBLIC ACTS AND JUDICIAL PROCEEDINGS.

111. The constitution also provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

Public Acts.

This constitutional requirement implies that the public acts (that is, statutes) of every state shall be given the same effect by the courts of another state that they have by law and usage at home. This of course does not give them any ex-territorial effect, but applies only to the determination of cases which they are alleged to govern. But the courts of one state cannot take judicial notice of the laws of another state; they must be proved as facts.[13]

Judgments and Decrees.

If it were not for this provision of the constitution, and the acts of congress passed in pursuance of it, the judgments and decrees of each state would be regarded as foreign judgments in the courts of every other state, and their effect would have to be determined by the principles of international law or by such other considerations as are influential in fixing the status of judicial records brought from foreign countries.[14] A similar provision was found in the arti-

Daniel v. Trustees of Richmond, 78 Ky. 542; State v. Lancaster, 63 N. H. 267; Rash v. Holloway, 82 Ky. 674. See In re Rudolph, 6 Sawy. 295, 2 Fed. 65.

[12] Walling v. Michigan, 116 U. S. 446, 6 Sup. Ct. 454; Webber v. Virginia, 103 U. S. 344; Vines v. State, 67 Ala. 73.

[13] Chicago & A. R. Co. v. Wiggins Ferry Co., 119 U. S. 615, 7 Sup. Ct. 398.

[14] Buckner v. Finley, 2 Pet. 586; Warren Manuf'g Co. v. Etna Ins. Co., 2 Paine, 501, Fed. Cas. No. 17,206.

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cles of confederation, and it was construed as prohibiting a re-examination on the merits of a decree rendered in a sister state.[15]

In pursuance of the power given to congress to prescribe the manner of authenticating the records and judicial proceedings of other states, and the effect thereof, that body early passed an act which was expressed as follows: "The records and judicial proceedings of the courts of any state shall be proved and admitted in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken." A subsequent statute extended the provisions of this act to "the territories of the United States, and the countries subject to the jurisdiction of the United States."[16] This statute, it is held, does not prevent a state from making such further rules, in regard to the authentication of foreign judgments, as it may deem best, provided only that they are not inconsistent with the act of congress. Neither does the statute render it inadmissible to prove such a judgment in a manner which would be sufficient at common law.[17]

It is now finally and firmly settled that a judgment rendered by a court of competent authority, having jurisdiction of the parties and the subject matter, in one state, is conclusive on the merits in the courts of every other state, when made the basis of an action, and in such action the merits cannot be inquired into.[18] Under this clause of the constitution, therefore, the judgment of a court in a sister state is to be accorded the same faith and credit which it re-

[15] Jenkins v. Putnam, 1 Bay (S. C.) 8.

[16] Act May 26, 1790 (1 Stat. 122; Rev. St. U. S. § 905); Act March 27, 1804 (2 Stat. 298).

[17] Gaines v. Relf, 12 How. 472; White v. Burnley, 20 How. 235.

[18] Mills v. Duryea, 7 Cranch, 481; Hampton v. McConnell, 3 Wheat. 234; McElmoyle v. Cohen, 13 Pet. 312; Christmas v. Russell, 5 Wall. 290; Insurance Co. v. Harris, 97 U. S. 331.

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ceives at home. It is of a higher grade than a foreign judgment, for its effect is regulated by the constitution. But yet it is not the same as a domestic judgment, for it is not executory by itself. But the judgment, if valid at home, is to be considered valid everywhere within the United States, and if binding on the parties at home, it is conclusive in all other courts in the Union.[19] But the judgment, as already stated, is not executory in a foreign state; that is, it does not per se authorize the issue of final process or the exercise of auxiliary jurisdiction, but only when merged in a new judgment recovered in the foreign state.[20] Again, judgments of one state, when sought to be enforced in the courts of another, do not enjoy the right of privilege, priority, or lien which they have in the state where they are pronounced, but only that which the lex fori gives to them by its own laws in their character of foreign judgments.[21] And while the judgment is conclusive on the merits, yet it is open to the party who desires to assail it to show that it is not in effect a valid and subsisting judgment, such as is entitled to the benefit of the constitutional provision. Thus, he may show that the judgment has been set aside by the court which rendered it, or reversed by an appellate court. Further, he may show anything which goes in discharge of the judgment, as that it has been paid, or released, or compromised. Also he may show that the judgment, as a cause of action, is barred by the statute of limitations of the state where the judgment is sought to be enforced, if that statute is so framed as to include judgments.[22] So also, the party may deny that the court which rendered the judgment had jurisdiction of his person or of the subject matter of the suit, and thereupon it becomes the duty of the court where the record is offered to inquire into the allegation, and if it is found that there was such a lack of jurisdiction, then the judgment must not be en-

[19] Armstrong v. Carson, 2 Dall. 302, Fed. Cas. No. 543; Nations v. Johnson, 24 How. 195; Field v. Gibbs, 1 Pet. C. C. 155, Fed. Cas. No. 4,766; Bryant v. Hunter, 3 Wash. C. C. 48, Fed. Cas. No. 2,068.

[20] Claflin v. McDermott, 12 Fed. 375; Walser v. Seligman, 13 Fed. 415.

[21] McElmoyle v. Cohen, 13 Pet. 312; Story, Confl. Laws, § 609.

[22] McElmoyle v. Cohen, 13 Pet. 312; Napier v. Gidiere, 1 Speer, Eq. 215; Reid v. Boyd, 13 Tex. 241; Jacquette v. Hugunon, 2 McLean, 129, Fed. Cas. No. 7,169.

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forced against him.[23] But the judgment is not impeachable in the courts of another state on the ground of any mere error or irregularity, or upon any allegations that it was unjust or ill-founded. And it seems also (though the point is not entirely free from doubt) that fraud in the obtaining of the judgment is not a good defense, for the party who desires to avoid it on the ground of fraud has his opportunity in the court which rendered the judgment, and it is there he must avail himself of it.[24]

The question of the validity and effect of judgments from another state has most frequently arisen in cases where such judgments were given against non-residents. Without attempting to discuss all the various and interesting questions which are involved in this subject, it may be said, briefly, to be the accepted doctrine that the judicial process of a state has no ex-territorial force or efficacy; that such process cannot be sent into another state and there served on a party with the effect of legally obliging him to appear; that in such case the service amounts to no more than a constructive service; that the same consequences and no others attach to the service of process by published advertisement; that in neither of these modes can the courts of the state acquire such jurisdiction over the person of the defendant as will authorize them to pronounce a personal judgment against him; that a personal judgment rendered in an action where the only service of process on the defendant was constructive, is not to be regarded as valid or binding in the courts of any other state. But since each state has the right and power to legislate concerning the property which is within its limits, and to provide for its submission to pay the debts of its owner, it is held that where an action is begun against a non-resident by the attachment of property within the jurisdiction of the court, this will confer jurisdiction, not against the defendant personally, but against the property attached, to the extent of authorizing the court to render a judgment which may be enforced

[23] D'Arcy v. Ketchum, 11 How. 165; Bischoff v. Wethered, 9 Wall. 812; Thompson v. Whitman, 18 Wall. 457; Galpin v. Page, Id. 350; Cheever v. Wilson, 9 Wall. 108; Arnott v. Webb, 1 Dill. 362, Fed. Cas. No. 562; Harris v. Hardeman, 14 How. 334.

[24] Hanley v. Donoghue, 116 U. S. 1, 6 Sup. Ct. 242; Anderson v. Anderson, 8 Ohio, 108; 2 Black, Judgm. §§ 916-921.

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against that property. And such a judgment, to that extent, is to be regarded as valid and binding everywhere else.[25] While the statute of limitations of the state of the forum may be pleaded in defense, yet it would not be competent for a state to so frame its law of limitations, with respect to judgments from other states, as to effectually nullify them by cutting off all remedy whatever. It is always within the constitutional rights of parties to have a reasonable opportunity to enforce their demands.[26] A judgment rendered by a justice of the peace in another state, although the court be not one of record, is a judicial proceeding within the meaning of the constitution, and full faith and credit is to be accorded to it.[27] The federal tribunals are not regarded as foreign to each other or to those of the several states. Hence the judgment of a United States court, when sued on in a state court or in another United States court, is entitled to full faith and credit, and so are the judgments of the state courts when offered in the federal tribunals.[28] And the same rule applies to the effect of the judgments of the courts in the territories and the District of Columbia.[29]

INTERSTATE EXTRADITION.

112. It is provided by the federal constitution that "a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."

[25] See Pennoyer v. Neff, 95 U. S. 725; Cooper v. Reynolds, 10 Wall. 308; D'Arcy v. Ketchum, 11 How. 165; Williams v. Armroyd, 7 Cranch, 423; Boswell v. Otis, 9 How. 336; Chase v. Chase, 6 Gray, 157.

[26] Christmas v. Russell, 5 Wall. 290.

[27] Stockwell v. Coleman, 10 Ohio St. 33; Carpenter v. Pier, 30 Vt. 81; Glass v. Blackwell, 48 Ark. 50, 2 S. W. 257.

[28] Crescent City Live-Stock Co. v. Butchers' Union Slaughterhouse Co., 120 U. S. 141, 7 Sup. Ct. 472; U. S. v. Dewey, 6 Biss. 501, Fed. Cas. No. 14,956; Amory v. Amory, 3 Biss. 266, Fed. Cas. No. 334.

[29] Johnson v. Dobbins, 5 Wkly. Notes Cas. (Pa.) 537; 2 Black, Judgm. § 968.

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113. To warrant the rendition of an alleged criminal under this provision, it is requisite—

(a) That he should be charged with the commission of a crime made punishable by the laws of the state demanding his surrender.

(b) That he should be a fugitive from the justice of that state.

(c) That his rendition should be demanded by the executive authority of that state.

(d) That the requisition should be accompanied by a copy of an indictment found against him, or an affidavit made before a magistrate charging him with having committed the crime alleged.

(e) That he should be arrested on the order or authorization of the executive authority of the state on which the requisition is made.

114. Both the federal and the state courts have jurisdiction, on habeas corpus, to inquire into the lawfulness of the custody in which an alleged criminal is held on the execution of a requisition.

115. A person extradited from one state to another may be tried, in the latter state, not only for the offense with which he was charged in the requisition papers, but for any and all criminal charges which that state may have against him.

The articles of confederation contained a similar clause. It was in the following words: "If a person guilty of, or charged with, treason, felony, or other high misdemeanor in any state shall flee from justice and be found in any of the United States, he shall, on demand of the governor or executive power of the state from which he fled, be delivered up and removed to the state having jurisdiction of his offense." [80] It is now regarded as settled doctrine that one nation cannot claim, as a matter of general international law, and independently of treaty stipulations, that another

[80] Articles of Confederation, art. 4, cl. 2.

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shall surrender up criminals fleeing from the justice of its laws. And the criminal laws of a state have no operation beyond its territorial bounds, and its jurisdiction to enforce them is equally limited. Hence, but for the provisions of the federal constitution, no state would be under obligation to surrender to another state any person within its borders. The right of asylum in each would be as complete and inviolable as it is in independent nations in the absence of treaty stipulations.[31] This being the case, the undoubted moral duty which rests upon the several states of the Union in this regard could never be enforced if the matter had not been regulated by the federal constitution. And especially is this true since the states are forbidden to make treaties, and cannot, without the consent of congress, enter into any agreement or compact with each other. "The uniform opinion heretofore has been that the states, on the formation of the constitution, had the power of arrest and surrender in such cases, and that so far from taking it away, the constitution has provided for its exercise contrary to the will of a state in the case of a refusal, thereby settling, as among the states, the contested question whether, on demand, the obligation to surrender was perfect and imperative, or whether it rested on comity and was discretionary." [32] This provision of the federal constitution, it is said, is in the nature of a treaty stipulation between the states of the Union, and is equally as binding on each state and all the officers thereof for its faithful execution as though it were a part of the constitution of each state.[33] But it is still competent for the legislature of a state, in the exercise of its reserved sovereign powers, and as an act of courtesy to a sister state, to provide by statute for the surrender on requisition of persons indictable for murder in such state, although they have never "fled from justice." [34]

It has never been fully decided whether this clause of the constitution intended to leave the regulation of interstate extradition wholly to the individual states, or whether it was intended that congress should pass laws to enforce the provisions of this article. But at a very early day (1793) congress assumed to define the duties of

[31] Ex parte McKnight, 48 Ohio St. 588, 28 N. E. 1034.

[32] Holmes v. Jennison, 14 Pet. 540, 597. See In re Fetter, 23 N. J. Law, 311.

[33] Hibler v. State, 43 Tex. 197.

[34] State v. Hall, 115 N. C. 811, 20 S. E. 729.

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the states in this matter more explicitly than had been done in the constitution itself. It was enacted that "whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found, or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. Any agent so appointed who receives the fugitive into his custody shall be empowered to transport him to the state or territory from which he has fled." [35] Since the constitution uses only the word "states," in providing for extradition, while the act of congress applies by its terms equally to the states and the territories, the question has been raised whether the statute is not unconstitutional, in so far as it relates to the extradition of fugitives from the territories, for want of power in congress to prescribe it. But it has been ruled otherwise, and it is held that the statute is valid and constitutional in all its material parts.[36]

To authorize the issuance of a requisition, there must be an offense charged which is punishable under the laws of the state from which

[35] Rev. St. U. S. §§ 5278, 5279.

[36] Prigg v. Pennsylvania, 16 Pet. 539; Spear, Extradition, 232. For a criminal offense committed within the District of Columbia the offender, if found beyond the District, may be removed there for trial. In re Buell, 3 Dill. 116, Fed. Cas. No. 2,102. But the Cherokee Nation is neither a "state" nor a "territory," as these words are used in the constitution. Hence the constitution does not authorize the governor of a state to honor the demand of the chief of the Cherokee Nation for the extradition of a fugitive. Ex parte Morgan, 20 Fed. 298.

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the requisition issues.[37] But it need not be an offense known to the common law; it may have been created by statute. And it need not be an offense which was known and recognized as such at the time of the adoption of the constitution, but may be of later creation. The words, "treason, felony, or other crime," as used in the constitution, include every offense forbidden and made punishable by the laws of the state where the crime is committed.[38]

To authorize the surrender of the alleged criminal, he must be a "fugitive from justice." This phrase describes one who, having committed a crime in one jurisdiction, flees therefrom in order to evade the law and escape punishment.[39] But any person answers the description who has committed a crime in a state and withdraws from the jurisdiction of its courts without waiting to abide the consequences of his act; and it is not material that some other cause than a desire to "flee" induced such withdrawal.[40] "To be a fugitive from justice, * * * it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that having, within a state, committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction and is found within the territory of another."[41] One who goes from the state of his residence into another state, and there commits a crime, and then returns home, is as much a fugitive from justice as though he had committed a crime in the state in which he resided and then fled to some other state.[42] The constitution and laws apply only to crimes actually committed within the jurisdiction of the demanding state, not to such as were only constructively committed there, when the offender was not, at the time of the crime, and has not since been, within that jurisdic-

[37] Extradition Case, 9 Pa. Co. Ct. R. 27.

[38] Kentucky v. Dennison, 24 How. 66; Morton v. Skinner, 48 Ind. 123; Brown's Case, 112 Mass. 409; State v. Stewart, 60 Wis. 587, 19 N. W. 429.

[39] State v. Hall, 115 N. C. 811, 20 S. E. 729.

[40] In re White, 55 Fed. 54, 5 C. C. A. 29.

[41] Roberts v. Reilly, 116 U. S. 80, 6 Sup. Ct. 291.

[42] In re Roberts, 24 Fed. 132; In re Keller, 36 Fed. 681.

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tion.[43] Hence where one has been only constructively present in a state, by being deemed, by a legal fiction, to have followed an agency or instrumentality put in motion by him to accomplish a criminal purpose, he cannot be said to be a fugitive from the justice of that state.[44] A fugitive from justice who, pending extradition, commits an offense against the laws of the state of asylum, must answer for such offense before surrender to the state demanding extradition.[45]

It will be observed that the act of congress on this subject provides that the requisition must be accompanied by "a copy of an indictment found, or an affidavit made, before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime." It is held that, within the meaning of this statute, an information is not the equivalent of an indictment; nor is the verification on belief of an information equivalent to such an affidavit as is contemplated.[46] If the prisoner is delivered up to the authorities of the demanding state on a requisition based on a false affidavit that he is a fugitive, he will be released on habeas corpus.[47]

When the requisition is regular, and proceeds from the proper authority, and is accompanied by the necessary papers, in due and regular form, it is the duty of the governor upon whom the requisition is made to surrender the fugitive. But this duty is left to his fidelity and moral sense. If he will not perform it, the courts have no power to compel him by mandumus, nor is there any other way in which he can be constrained.[48]

The courts have power, on habeas corpus, to review the decisions of the executive authority in extradition proceedings. A person arrested under a warrant of extradition from one state of the Union to another is "in custody under or by color of the authority of the United States," and hence the federal courts have jurisdiction to inquire by habeas corpus into and determine the legality of the same.[49]

[43] Ex parte State, 73 Ala. 503.
[44] State v. Hall, 115 N. C. 811, 20 S. E. 729.
[45] Ex parte Hobbs, 32 Tex. Cr. App. 312, 22 S. W. 1035.
[46] Ex parte Hart, 11 C. C. A. 165, 63 Fed. 249.
[47] Tennessee v. Jackson, 36 Fed. 258.
[48] Kentucky v. Dennison, 24 How. 66.
[49] In re Doo Woon, 18 Fed. 898; In re Roberts, 24 Fed. 132.

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But their jurisdiction in this respect is not exclusive; it is concurrent with that of the state courts. Generally speaking, the courts will not overrule the decisions of the governor, in extradition cases, unless they are clearly satisfied that an error has been committed.[50] Thus, on habeas corpus, the sufficiency of the indictment as a matter of technical pleading will not be inquired into.[51] Nor, in reviewing the action of the executive in these proceedings, will the courts inquire into the motives and purpose of the proceeding (as, whether it is really to punish a crime or only to collect a debt), nor interfere with any matter connected therewith which lies within the discretion of the governor.[52]

It is generally provided by the extradition treaties made by this country with foreign nations that a surrendered criminal can be tried only for the specific offense for which he was extradited. And if he is tried and acquitted on that charge, or if he is not tried for that offense at all, he has then the right to be set at liberty, and must be allowed a reasonable time to return to the country from which he was taken, before being proceeded against on any other accusation.[53] And it has sometimes been thought that the same principle should apply to extradition as between the several states of the Union. But it is now settled that, in the case of extradition from one state to another, the prisoner has no right or claim to be afforded an opportunity of returning to the state to which he first fled before being tried for another and distinct offense from that designated in the requisition papers. In other words, when the state regains possession of the fugitive, it may proceed at once to try him for any and all charges which it may have against him.[54]

A fugitive from justice charged with crime will not be released

[50] Robb v. Connolly, 111 U. S. 624, 4 Sup. Ct. 544; Ex parte Reggel, 114 U. S. 642, 5 Sup. Ct. 1148; Ex parte Brown, 28 Fed. 653; Hibler v. State, 43 Tex. 197; In re Robb, 64 Cal. 431, 1 Pac. 881; Ex parte State, 73 Ala. 503.

[51] Pearce v. Texas, 155 U. S. 311, 15 Sup. Ct. 116.

[52] In re Sultan, 115 N. C. 57, 20 S. E. 375.

[53] U. S. v. Rauscher, 119 U. S. 407, 7 Sup. Ct. 234.

[54] Lascelles v. Georgia, 148 U. S. 537, 13 Sup. Ct. 687; People v. Cross, 64 Hun, 348, 19 N. Y. Supp. 271; Id., 135 N. Y. 536, 32 N. E. 246; State v. Stewart, 60 Wis. 587, 19 N. W. 429; Carr v. State, 104 Ala. 4, 16 South. 150; In re Petry (Neb.) 66 N. W. 308; State v. Kealy, 89 Iowa, 94, 56 N. W. 283. Compare Ex parte McKnight, 48 Ohio St. 588, 28 N. E. 1034.

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on habeas corpus because he was induced by a stratagem or trick to come within territory where he could properly be arrested, provided the stratagem used was not itself an infraction of law.[55] And even if a person is kidnapped and forcibly brought back to the state where his crime was committed, without any extradition or other regular proceedings, this will give him a right to proceed against his abductor, but it is no reason why he should not be tried by the courts of that state for his offense against its laws.[56] Nor, in such a case, is there any mode in which the state from which he was abducted, or the prisoner himself, can demand and secure his restoration to that state, under the constitution and laws of the Union.[57]

[55] Ex parte Brown, 28 Fed. 653.

[56] Kerr v. Illinois, 119 U. S. 436, 7 Sup. Ct. 225; Cook v. Hart, 146 U. S. 183, 13 Sup. Ct. 40; In re Mahon, 34 Fed. 525.

[57] Mahon v. Justice, 127 U. S. 700, 8 Sup. Ct. 1204.

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CHAPTER X.

THE ESTABLISHMENT OF REPUBLICAN GOVERNMENT.

116-118. Republican Government Guarantied.
119. Reconstruction.

REPUBLICAN GOVERNMENT GUARANTIED.

116. The federal constitution provides that "the United States shall guarantee to every state in this Union a republican form of government."

117. A republican government is one in which the powers of sovereignty are vested in the people and are exercised by the people, either directly, or through representatives chosen by the people, to whom those powers are specially delegated.

118. This clause of the federal constitution implies—

(a) A power in the federal authorities to preserve, though not to create, republican governments in the several states.

(b) A limitation upon the power of the people of each state in forming or amending their state constitutions.

Meaning of the Term.

No particular government is designated as "republican," neither is the exact form to be guarantied in any manner especially described. Here, as in other parts of the constitution, we are compelled to resort elsewhere to ascertain what was intended. The guaranty necessarily implies a duty on the part of the states themselves to provide such a government. All the states had governments when the constitution was adopted. In all, the people participated, to some extent, through representatives elected in the manner specially provided. These governments the constitution did not change. They were accepted precisely as they were, and it is therefore to be presumed that they were such as it was the

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duty of the states to provide. Thus we have unmistakable evidence of what was "republican" in form within the meaning of the term as employed in the constitution.[1] A republican form of government, as distinguished from an autocracy, monarchy, oligarchy, aristocracy, or other form of government, is one which is based on the political equality of men. It is a government "of the people, for the people, and by the people." Its laws are made either by the whole people in a body (in which case the form of government is properly called a "democracy") or by representatives chosen for that purpose by the people. Its executive power is lodged in the hands of a chief magistrate, elected by the people, directly or indirectly. It excludes the idea of an hereditary ruler or class of rulers. But the idea of a republic by no means involves the principle of universal suffrage. It is not inconsistent with a republican government that the right to vote should be restricted to adults, males, property owners, or those possessing the elements of education. It is only necessary that the suffrage should be generally extended to those deemed competent to exercise it, or at least that it should not be so restricted as to exclude all but a favored class from participation in political rights and privileges. "By the constitution a republican form of government is guarantied to every state in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves."[2] "In a republic all the citizens, as such, are equal, and no one can rightfully exercise authority over another but by virtue of power constitutionally given by the whole community, which authority, when exercised, is in effect the act of the community. Sovereignty resides in the people in their political capacity."[3]

Importance of the Guaranty.

"Without a guaranty, the assistance to be derived from the national government in repelling domestic dangers which might threaten the existence of the state constitutions, could not be de-

[1] Minor v. Happersett, 21 Wall. 175.

[2] In re Duncan, 139 U. S. 449, 11 Sup. Ct. 573.

[3] Penhallow v. Doane's Adm'rs, 3 Dall. 93.

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manded as a right from the national government. Usurpation might raise its standard and trample upon the liberties of the people, while the national government could legally do nothing more than behold the encroachments with indignation and regret. A successful faction might erect a tyranny on the ruins of order and law, while no succor could be constitutionally afforded by the Union to the friends and supporters of the government."[4]

Extent of Federal Power.

The power and duty of the United States to guaranty a republican form of government extends not only to the protection of the particular state whose government is threatened, for any cause, with change, but also to the protection of all the other states in the Union. Such is the relation between the several members of the American Union that each has the strongest interest in the maintenance in all the others of republican government. The prosperity, and in some sense the safety, of each and of the whole depends upon the continuance in each of those forms and institutions which have come to be accepted as the American exposition of the system of republican government. Hence there might possibly be cases in which it would be the right and duty of the federal government to interfere, even although the particular state, or all its people, had no disposition to invoke the protection of the guaranty. In effect, the guaranty does not only contain a promise to each state that it shall continue to enjoy a republican form of government as long as the Union endures, but also it imports a command to each state to maintain and preserve that form of government, under penalty of the intervention of the federal Union for the benefit of all its members. But "the authority extends no further than to a guaranty of a republican form of government, which supposes a pre-existing government of the form which is to be guarantied. As long, therefore, as the existing republican forms are continued by the states, they are guarantied by the federal constitution. Whenever the states may choose to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is that they shall not exchange republican for anti-republican con-

[4] 2 Story, Const. § 1814.

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stitutions, a restriction which, it is presumed, will hardly be considered as a grievance."[5]

"Under this article of the constitution, it rests with congress to decide what government is the established one in a state. For as the United States guaranty to each state a republican government, congress must necessarily decide what government is established in the state before it can determine whether it is republican or not. And when the senators and representatives of a state are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal."[6]

But this power vested in congress does not give it the right to regulate the elective franchise in the several states, or prescribe the qualifications of voters. It is true that a state might so limit the right of suffrage as practically to restrict all participation in the government to a favored class, and the effect of such a restriction would amount to the establishment of an oligarchy or aristocracy, which would certainly be incompatible with a republican form of government. And in this extreme case, it might be the duty of congress to interfere. But while congress has the power to determine (and necessarily must determine in any given case) whether the government actually existing in a state is republican or not, it is not authorized to declare that universal suffrage is implied in the idea of a republican government or that such and such restrictions of the right of suffrage are inconsistent with such a form of government.[7]

A Limitation on State Power.

When a new state is to be admitted into the Union, it is the right and duty of congress, under this clause, to see to it that the form and constitution of government proposed to be adopted is republican. And the determination of congress to that effect, manifested by its admission of the new state, is final and conclusive. So, also, when the people of an existing state undertake to revise or amend the con-

[5] The Federalist, No. 21. [6] Luther v. Borden, 7 How. 1.
[7] Pom. Const. Law, § 210.

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stitution of the state, their power in that regard is, as we have already seen,[8] limited by the clause in question. It would not be lawful for them to make such changes in their constitution as would amount to abolishing the republican form of government previously existing and setting up in its place an unrepublican form or system.

The District of Columbia.

Since the District of Columbia is not a "state," it appears that the United States is under no obligation to guaranty to the District or to its inhabitants a republican form of government. And in fact, the government of the District is not at all in the form of a republic, since its residents have no voice in the selection of those who make their laws, and no power to choose those who shall administer the laws.

RECONSTRUCTION.

119. In the exercise of the power given by this clause of the constitution, congress, at the close of the late civil war, made provision for the reorganization and restoration of legitimate governments, republican in form, in the states which had passed ordinances of secession.

The constitutional authority of congress to pass the "reconstruction acts," for the restoration of legitimate governments in the states which had joined in the late rebellion, was derived from this clause. In the leading case on this subject it was said, inter alia: "The government and the citizens of the state (Texas) refusing to recognize their constitutional obligations, assumed the character of enemies and incurred the consequences of rebellion. These new relations imposed new duties upon the United States. The first was that of suppressing the rebellion. The next was that of re-establishing the broken relations of the state with the Union. The first of these duties having been performed, the next necessarily engaged the attention of the national government. The authority for the performance of the first had been found in the power to suppress insurrection and carry on war; for the performance of the second, authority was derived from the obligation of the United States to guaranty

[8] Ante, p. 48.

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to every state in the Union a republican form of government. The latter, indeed, in the case of a rebellion which involves the government of a state, and for the time excludes the national authority from its limits, seems to be a necessary complement to the former. Of this the case of Texas furnishes a striking illustration. When the war closed, there was no government in the state except that which had been organized for the purpose of waging war against the United States. That government immediately disappeared. . . . . The new freemen necessarily became a part of the people, and the people still constituted the state; for states, like individuals, retain their identity though changed to some extent in their constituent elements. And it was the state thus constituted which was now entitled to the benefit of the constitutional guaranty. There being then no government in Texas in constitutional relations with the Union, it became the duty of the United States to provide for the restoration of such a government. But the restoration of the government which existed before the rebellion, without a new election of officers, was obviously impossible; and before any such election could be properly held, it was necessary that the old constitution should receive such amendments as would conform its provisions to the new conditions created by emancipation and afford adequate security to the people of the state. In the exercise of the power conferred by the guaranty clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential only that the means must be necessary and proper for carrying into execution the power conferred, through the restoration of the state to its constitutional relations, under a republican form of government, and that no acts be done, and no authority exerted, which is either prohibited or unsanctioned by the constitution. . . . . The power to carry into effect the clause of guaranty is primarily a legislative power and resides in congress. . . . . The action of the President must therefore be regarded as provisional, and in that light it seems to have been regarded by congress." Congress "proceeded after long deliberation to adopt various measures for reorganization and restoration. These measures were embodied in proposed amendments to the constitution and in the acts known as the reconstruction acts, which have been so far carried into effect that a majority of the

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states which were engaged in the rebellion [now all] have been restored to their constitutional relations, under forms of government adjudged to be republican by congress, through the admission of their senators and representatives into the councils of the Union." [9]

[9] Texas v. White, 7 Wall. 700.

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CHAPTER XI.

EXECUTIVE POWER IN THE STATES.

120–122. State Executive Officers.
123–124. Independence of Executive.
125. Powers of Governor.

STATE EXECUTIVE OFFICERS.

120. The executive power in each of the states and territories is lodged in a chief magistrate, who is called the "governor."

121. In most of the states, there is a second executive officer, called the "lieutenant governor," who is to succeed the governor in his office in case of the death, resignation, removal, or disability of the latter.

122. The subordinate officers of a state government, after the governor and lieutenant governor, are ordinarily as follows:

(a) The secretary of state.
(b) The state treasurer.
(c) The state comptroller.
(d) The state auditor.
(e) The attorney general.
(f) The superintendent of public instruction.

The Governor.

In each of the states the chief officer of the executive department is called the "governor." In all, he is elected directly by the people. His term of office varies, in the different states, from one to four years. He is the official head of the state, and, generally speaking, is its representative in its relations with the other states and with the Union. In each of the organized territories of the United States the executive power is vested in a governor, appointed by the President by and with the advice and consent of the senate, who holds his office

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for the term of four years, unless sooner removed by the appointing power.[1]

The Lieutenant Governor.

This officer, in all the states where the office exists, is elected by the people. His functions are limited. In most of the states he acts as president of the senate and has a casting vote. He succeeds to the office of governor upon the death, impeachment, resignation, or disability of the incumbent of that office. When the duties of the office of governor devolve upon the lieutenant governor, by reason of the death or disability of the governor, he becomes permanent acting governor of the state for the remainder of the term, or until the disability of the governor is removed, and is entitled to draw the salary attached to the office of governor.[2]

Subordinate State Officers.

Although there is no absolute uniformity in the state constitutions as to the officers composing the remainder of the executive department, those enumerated above are the ones most commonly provided for. In most of the states, all these officers are to be chosen by the people at a general election. But in some, certain of the executive officers are appointed by the governor, and, in a few states, some of them are chosen by the legislature. Where the constitution provides that the executive department of the state shall consist of certain enumerated officers, its purpose is to provide for such executive officers as were deemed absolutely indispensable at the time the constitution was adopted, leaving it to the legislature to create new offices when they became necessary, and to abolish the same. But the legislature has no authority to abolish any of those enumerated in the constitution.[3] These state officers, it should be observed, occupy a position very different from that of the heads of the executive departments of the United States. They do not form a cabinet or ministry to the governor. They are not generally chosen by him, nor are they under his direction or control. Their duties and powers are specifically marked out in the constitution, and they are not responsible for their official acts to either the governor or the legislature, but only to the people or the courts.

[1] Rev. St. U. S. § 1841. [2] State v. La Grave (Nev.) 45 Pac. 243.
[3] Parks v. Commissioners (Colo. Sup.) 43 Pac. 542.

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INDEPENDENCE OF EXECUTIVE.

123. The governor is invested with those powers, and charged with those duties, which, under the American system, are regarded as executive in their nature, as distinguished from legislative and judicial powers and duties.

124. In the exercise of his constitutional powers, and in the discharge of his constitutional duties, he is independent of the other departments of government and free from any interference or obstruction on their part.

The constitutional principle which requires that the executive department of government shall be separate from the legislative and judicial departments, and that the head of the one department shall be free and independent in the exercise of his constitutional powers from all control or interference of the others, has been fully considered in the chapter relating to the three departments of government, to which the reader is here referred.

In regard to the manner of exercising those powers which the constitution specifically confides to the governor, it seems that the legislature, while it cannot, under pretense of regulation, deprive the executive of any branch of his constitutional power, or unduly hinder him in the exercise of it, may yet make rules for his governance in many cases where his authority over the subject is not exclusive of that of the legislature, or where the constitution has not furnished the exclusive rule for the exercise of the power.

While the governor may be called to account, like any other citizen, for the consequences of his private and personal acts, whether the liability therefor is civil or criminal, yet he is not answerable in the courts for any acts performed by him in his official capacity which are political in their character or involve the exercise of his judgment and discretion as governor.[4] For example, it being made the gov-

[4] See pp. 13, 14, 84, supra. In English law, an ordinary action cannot be maintained against the king. But the subject may proceed by petition of right, which he may now by statute bring in any of the superior courts in which an action might have been brought if it had been a question between private parties. This method of procedure is illustrated in the Bankers' Case, 14 How. St. Tr. 1. The governor of an English colony is not exempt from being

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ernor's duty to issue a certificate of election to each person elected a representative in congress, the courts have no jurisdiction to enjoin the governor from issuing a certificate to an applicant for it, or to compel him to deliver a certificate to another person; for the official acts of the executive can neither be restrained nor coerced by the courts.[5] Neither can he be compelled by the courts to appear and testify in relation to matters pertaining to the exercise of his executive functions; nor can he be constrained by attachment to disclose, in aid of an investigation before a grand jury, secrets of the business of the executive department which he does not consider it expedient to reveal.[6] In the case cited from New Jersey it was said: "The governor cannot be examined as to his reasons for not signing the bill, nor as to his actions in any respect regarding it. But there is no reason why he should not be called upon to testify as to the time it was delivered to him. This is a bare fact that includes no action on his part. To this extent, at least, I am of opinion that he is bound to appear and testify. But I will make no order on him for that purpose. * * * * Such order ought not to be made against the executive of the state, because it might bring the executive in conflict with the judiciary. If the executive thinks he ought to testify, in compliance with the opinion of the court, he will do so without order. If he thinks it to be his official duty, in protecting the rights and dignity of his office, he will not comply even if directed by an order. And, in his case, the court would hardly entertain proceedings to compel him by adjudging him in contempt. It will be presumed the chief magistrate intends no contempt, but that his action is in accordance with his official duty."[7]

sued for his debts or torts, but if judgment is given against him, his person is not liable to be taken in execution while he is on service. Hill v. Bigge, 3 Moore, P. C. 465.

[5] Bates v. Taylor, 87 Tenn. 319, 11 S. W. 266.

[6] Hartranft's Appeal, 85 Pa. St. 433; Thompson v. Railroad Co., 22 N. J. Eq. 111.

[7] The governor should not be required, by a subpœna duces tecum, to produce in court papers which have been filed with him in his executive capacity, and which are in the nature of petitions or accusations against public officers and demands for their removal. Gray v. Pentland, 2 Serg. & R. (Pa.) 23.

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POWERS OF GOVERNOR.

125. The powers and duties of a state governor are ordinarily as follows:

(a) He is to take care that the laws of the state are faithfully executed.

(b) He is to inform the legislature of the condition of the state, and to recommend such measures of legislation as he deems necessary or important.

(c) He may require information from the different officers of the executive department upon subjects relating to the duties of their respective offices.

(d) He has the power of appointing certain of the officers of the state, and of removing officers for cause.

(e) He is commander in chief of the militia of the state.

(f) He has the power to grant pardons for offenses against the state, and reprieves.

(g) He has the power to convene the legislature in special session, and to adjourn them in certain cases.

(h) He has the power to veto bills passed by the legislature.

Appointments to Office.

Although, as a rule, the governor has the power of appointing certain of the officers of the state, there is no uniformity, in the different states, as to the officers who come within the appointing power of the executive. In some states, he has a very considerable power in this respect. In others, nearly all the important officers of the state are to be elected, leaving only inferior and subordinate offices to be filled by the governor. For example, in some few states, the judges are to be appointed by the governor, or by the governor and council. But, as a rule, the system of an elective judiciary prevails throughout the country. In some states, appointments made by the governor are to be confirmed by the senate or council; and, although the power of appointment is constitutionally vested in the governor, the

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legislature may provide that his nominations to office shall be confirmed by the senate.[8] The courts will not pass on the question whether the governor, in removing a public officer whom he had the power to remove, acted improperly and without cause.[9] But where the constitution gives him power to remove an officer only "for cause," his proceedings, in removing such officer, may be reviewed by the courts on certiorari, since the governor's action is judicial in its nature; but, out of respect for the chief executive, this writ should not issue against him if there is any other remedy.[10]

Commanding Militia.

The governor is commander in chief of the militia of the state, and his authority in this respect is interrupted only when the state troops are called into the actual service of the United States, in which case, by a provision of the federal constitution, the President becomes commander in chief. As commanding the militia, the governor has the power to recruit or fill up the active militia of the state to the maximum limit fixed by statute, and also to disband or muster out, at any time, any company thereof.[11]

Pardons and Reprieves.

In many of the states, the power to grant pardons and reprieves is not confided to the governor alone, but is to be exercised by a court of pardons, or board of pardons, of whom the governor must be one. The pardoning power was a branch of the royal prerogative in England, and has always been regarded, both in that country and in this, as an executive function. Nevertheless, parliament has always claimed, and sometimes exercised, the right to pass acts of general amnesty, and this example has occasionally been followed in America. The true doctrine seems to be that the right to accord a pardon for a specific offense to a designated individual is purely an executive power, while it remains competent for the legislative authority to proclaim an act of general amnesty or oblivion for all past offenses of a given class, or growing out of a given event or series of acts, without undertaking to designate the individuals who may profit by it.[12]

[8] State v. Boucher, 3 N. D. 389, 56 N. W. 142.

[9] State v. Rost, 47 La. Ann. 53, 16 South. 776.

[10] In re Nichols, 6 Abb. N. C. (N. Y.) 474.

[11] Lewis v. Lewelling, 53 Kan. 201, 36 Pac. 351.

[12] See State v. Blalock, Phil. (N. C.) 242; State v. Nichols, 26 Ark. 74.

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"The distinction between pardon, amnesty, and reprieve seems to be that pardon permanently discharges the individual designated from all or some specified penal consequences of his crime, but does not affect the legal character of the offense committed; while amnesty obliterates the offense, declares that government will not consider the thing done punishable, and hence operates in favor of all persons involved in it, whether intended and specified or not; and reprieve only temporarily suspends execution of punishment, leaving the legal character of the act unchanged and the individual subject to its consequences in time to come." [13]

Pardons are of two sorts,—absolute and conditional. It was a rule of the common law that the king, in granting a pardon, might annex to it any condition, precedent or subsequent, on the performance of which the validity of the pardon would be made to depend.[14] In our state constitutions this is generally provided for by granting to the executive the power to grant pardons "upon such terms as he shall think proper," or in words of similar import. Even without this specification, it would undoubtedly be competent for the governor, possessing general power to accord pardons, to annex conditions to the grant of a pardon, the only restriction being that the condition must neither be illegal, immoral, nor impossible to be performed. Thus, it is permissible for the governor to grant a pardon upon condition that the convict will leave the state and never return to it,[15] or that the convict shall totally abstain from the use of intoxicating liquors for five years.[16] Nonperformance of the condition annuls the pardon. That is, in the case of a condition precedent, if the convict does not perform it, the pardon never takes effect; and in the

[13] Abb. Law Dict. "Pardon." "'Pardon' and 'amnesty' are not precisely the same. A pardon is granted to one who is certainly guilty, sometimes before, but usually after, conviction; and the court takes no notice of it unless pleaded or in some way claimed by the person pardoned; and it is usually granted by the crown or by the executive. But amnesty is to those who may be guilty, and is usually granted by parliament or the legislature, and to whole classes, before trial. Amnesty is the abolition or oblivion of the offense; pardon is its forgiveness." State v. Blalock, Phil. (N. C.) 242.

[14] 4 Bl. Comm. 401.

[15] State v. Wolfer, 53 Minn. 135, 54 N. W. 1065; State v. Barnes, 32 S. C. 14, 10 S. E. 611.

[16] People v. Burns, 77 Hun, 92, 28 N. Y. Supp. 300.

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case of a condition subsequent, if it is not performed, the pardon becomes void, and the original sentence remains in full force and may be carried into effect.[17] Whether the condition has been kept or broken is a question of fact. And in some states it is held that a convict cannot, on the mere order of the governor, be arrested and remanded to suffer his original punishment because of an alleged nonperformance of the condition; but he is entitled to a hearing before a court, and an opportunity to show that he has performed the condition of his pardon, or that he has a legal excuse for not having done so.[18] But the general rule is that it rests with the governor alone to determine the fact of a breach of the condition, and to order the rearrest of the convict.[19]

A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may be rejected by the person to whom it is tendered, and, if it is rejected, there is no power in the courts to force it on him.[20] A pardon, to be available in subsequent judicial proceedings, must be pleaded. But a general act of pardon and amnesty promulgated by a public proclamation of the President of the United States has the force of law, and will be judicially noticed by the courts; it need not be specially pleaded by one seeking to take advantage of it.[21] A pardon once delivered by the executive authority, and accepted by the grantee, cannot be revoked by the authority which granted it.[22]

Where the effect of a conviction for felony is to disqualify the convict as a witness, a full and unconditional pardon for such a crime completely restores his competency as a witness, although it may be stated in the pardon that it was given for that very purpose.[23] A pardon granted by the President restores the convict to the rights and

[17] Flavell's Case, 8 Watts & S. (Pa.) 197.

[18] State v. Wolfer, 53 Minn. 135, 54 N. W. 1065; People v. Moore, 62 Mich. 496, 29 N. W. 80.

[19] Woodward v. Murdock, 124 Ind. 439, 24 N. E. 1047; Ex parte Marks, 64 Cal. 29, 28 Pac. 109; Ex parte Kennedy, 135 Mass. 48.

[20] U. S. v. Wilson, 7 Pet. 150, 161.

[21] Jenkins v. Collard, 145 U. S. 546, 12 Sup. Ct. 868.

[22] Rosson v. State, 23 Tex. App. 287, 4 S. W. 897; Knapp v. Thomas, 39 Ohio St. 377.

[23] Boyd v. U. S., 142 U. S. 450, 12 Sup. Ct. 292; Hoffman v. Coster, 2 Whart. (Pa.) 453.

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privileges of a citizen of the United States; but it does not, without the assent of the state, where the sovereign power had excluded him from political rights, restore him to the exercise of those rights.[24] The pardon will relieve the grantee from all further liability under his original sentence, and also will bar any civil proceedings for any penalties or forfeitures incurred by the same specific acts on which the criminal prosecution was based.[25] But it will not entitle him to a restitution of the fine or costs paid, nor to indemnity for any part of the penalty which he may have paid or suffered. A pardon is not retrospective.[26] And, further, the remission, by pardon, of a fine or forfeiture cannot divest an interest in either which, by law, has vested in private persons. So far as the public is interested in a fine or penalty, the executive remission has the effect to restore it, but, so far as a citizen has a vested right in it, it is beyond the power of the executive.[27] The recital of a specific distinct offense in a pardon limits its operation to that offense, and such pardon does not embrace any other offense for which separate penalties and punishments are prescribed.[28]

A contract with an attorney at law that the latter shall endeavor to obtain a pardon, and that, if he is successful, a stipulated sum shall be paid for his services, is not in itself illegal.[29] But a pardon procured by fraud upon the pardoning power, whether by suppression of the truth, misstatement, suggestion of falsehood, or any other imposition, is absolutely void.[30] A pardon granted by one who is de facto the governor of the state is valid, notwithstanding that he has not a perfect title or evidence of title to the office.[31]

Convening and Adjourning Legislature.

Whether or not an occasion exists which demands a special session of the legislature is a matter resting entirely in the judgment of the executive.[32] In some of the states it is specially provided in

[24] Ridley v. Sherbrook, 3 Cold. (Tenn.) 569.
[25] U. S. v. McKee, 4 Dill. 128, Fed. Cas. No. 15,688.
[26] Cook v. Freeholders of Middlesex, 26 N. J. Law, 326.
[27] In re Flournoy, 1 Kelly (Ga.) 606; 4 Bl. Comm. 399.
[28] Ex parte Welmer, 8 Biss. 321, Fed. Cas. No. 17,362.
[29] Moyer v. Cantieny, 41 Minn. 242, 42 N. W. 1060.
[30] Rosson v. State, 23 Tex. App. 287, 4 S. W. 897; 4 Bl. Comm. 400.
[31] Ex parte Norris, 8 S. C. 408.
[32] In re Veto Power, 9 Colo. 642, 21 Pac. 477.

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the constitution that, when the legislature is called together in special session by the governor, they shall not consider or act upon any subject save that for which they were assembled, or which may have been presented to them by a special message from the governor. Such a provision, it is held, requires that the subject for legislation shall be presented to the legislature by the governor in writing.[33] The business to be transacted at the special session is to be specially named in the executive proclamation or message, but is not to be particularly described in all its details. The legislature cannot go beyond the limits of the business specially named; but within such limits it may act freely, in whole or in part, or not at all, as it may deem expedient.[34] And, where there is no such constitutional restriction, the power of the legislature, when so specially convened, is not limited to considering the special subjects which prompted the call, but they may act on any subject, as at a regular session.[35] When the constitution gives the governor power to adjourn the legislature in case of a disagreement between the two houses, it is for him alone to decide whether cause exists for the exercise of his power in this regard, and the courts cannot review his decision.[36]

Executive Approval or Rejection of Bills.

The state constitutions provide that every bill which shall have passed the two houses of the legislature shall be submitted to the governor. If he approves it, he shall sign it; if not, he shall return it, with his objections, to the house in which it originated. Under this provision, the bill must be laid before the governor, or the person who for the time being is acting as governor, personally, for his revision; it is not enough that it may be left at his office.[37] Even when a bill, on its passage through the legislature, receives a larger majority of votes than would be sufficient to pass it over the governor's veto, it must be submitted to him for his consideration. He is a part of the lawmaking power of the state, and no act can become a law until he has had the opportunity of considering it. If it seems useless to send to the governor a bill which has already been

[33] Manor Casino v. State (Tex. Civ. App.) 34 S. W. 769.
[34] In re Governor's Proclamation, 19 Colo. 333, 35 Pac. 530.
[35] Morford v. Unger, 8 Iowa, 82.
[36] In re Legislative Adjournment, 18 R. I. 824, 27 Atl. 824.
[37] Opinion of Justices, 99 Mass. 636.

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voted for by more members than would suffice to override his veto, it should be remembered that he gives his reasons for the veto, and those reasons may be sufficient to change the vote in one or the other house when the bill is again considered by them.[38] A bill which has been sent to the governor may be amended by the legislature within the ten days allowed him for its consideration, but before he has taken action upon it.[39] But in some states it is held that, when the bill is in the hands of the governor, it is so far beyond the control of the legislature that neither house alone can recall the bill, and it is doubtful whether this could be done by the joint action of both houses.[40] In Colorado, however, it is said that there is no constitutional objection to the legislature's requesting, by joint or concurrent resolution, the return of a bill in the hands of the governor. He need not comply with such a request, but there is nothing to prevent him from returning the bill as requested, for reconsideration and amendment by the legislature.[41]

The governor usually has ten days within which to determine upon his approval or veto of a bill. In computing this time, either the day on which the bill was received by him or the day of its return is to be excluded; but one is to be included. And, where the last of the ten days falls on Sunday, he may return the bill on the following day.[42] In Vermont, it has been held that when the governor once intentionally and understandingly signs a bill it becomes a law, and it is not divested of that character though he afterwards erases his signature, intending to affix it in another place, but fails to do so.[43] But in Illinois the doctrine is that, during the time allowed him, the governor may sign the bill, and then erase his signature, at pleasure. "Until it has passed from his control by the constitutional and customary modes of legislation, he may reconsider and retract any approval previously made."[44] Notwithstanding some difference of opinion, it may be regarded as the now prevalent doctrine that the power

[38] State v. Crounse, 36 Neb. 835, 55 N. W. 246.
[39] McKenzie v. Commissioner (Tex. Sup.) 32 S. W. 1088.
[40] People v. Devlin, 33 N. Y. 269.
[41] In re Recalling Bills, 9 Colo. 630, 21 Pac. 474.
[42] In re Computation of Time, 9 Colo. 632, 21 Pac. 475.
[43] National Land & L. Co. v. Mead, 60 Vt. 257, 14 Atl. 689.
[44] People v. Hatch, 19 Ill. 283.

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of the governor to approve and sign a bill presented to him within ten days previous to the adjournment of the legislature does not cease with the adjournment, but he may sign the bill after the adjournment, and it thereupon becomes a law.[45] Unless the constitution so provides, it is not incumbent upon the governor to return to either house of the legislature any bill or act after it has received his approval and signature; if he reports to either house his approval of the bill, it is a matter of courtesy only.[46] Subsequent approval of an act by the governor does not dispense with requisites which must exist in order to confer authority on the legislature to pass the act.[47]

If the governor does not approve the bill, he is to return it, with his objections, to the house in which it originated. This return is usually and properly made by an executive messenger. If the governor, having announced his intention of vetoing a bill, delivers it to the member who introduced it, on his representation that it was recalled by the house for reconsideration, and the member hands it to private interested parties, it does not become a law under the constitutional provision that if the governor shall not return a bill within ten days it shall be a law in like manner as if he had signed it.[48] If the constitution gives the governor power merely to return the bill with his objections (that is, to veto the bill as a bill), he must treat it as a whole. He cannot disapprove of one item in an appropriation bill and approve all the rest. If he attempts to do this, the bill will be considered as approved as a whole, and every part of it will become law.[49] When the veto power is given to the governor, it is checked by a provision that bills vetoed by him may be passed over his veto by a prescribed majority of the members of both houses. It is held that a bill, after being so passed over the veto, need not be again signed

[45] People v. Bowen, 21 N. Y. 517; Solomon v. Commissioners, 41 Ga. 157; State v. Board of Sup'rs of Coahoma Co., 64 Miss. 358, 1 South. 501. Compare Hardee v. Gibbs, 50 Miss. 802; Fowler v. Peirce, 2 Cal. 165.

[46] State v. Whisner, 35 Kan. 271, 10 Pac. 852.

[47] Manor Casino v. State (Tex. Civ. App.) 34 S. W. 769.

[48] McKenzie v. Moore, 92 Ky. 216, 17 S. W. 483.

[49] Porter v. Hughes (Ariz.) 32 Pac. 165. But in Texas, and perhaps some other states, the constitution provides that the governor may object to one or more items of an appropriation bill and approve the rest. See Pickle v. McCall, 86 Tex. 212, 24 S. W. 265.

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by the presiding officers of the two houses; such passage makes it ipso facto a law.[50]

Executive Construction of Laws.

The executive is bound to give effect to the laws which regulate his duties, and in so doing he must necessarily put a construction upon them.[51] But a mere ministerial officer cannot be allowed to decide upon the validity of a law, and thus exempt himself from responsibility for disobedience to the command of a peremptory mandamus, his disobedience to the law being the cause of his inability to obey the command of the court.[52]

State Governors under the Federal Constitution.

The constitutional functions of the governor of a state are regulated to some extent by the constitution of the United States, and chiefly in relation to matters concerning the intercourse of the states with each other, and to the representation of the state in congress. Thus, by the fourth article of the constitution, a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime. Again, the United States is bound to protect each state against domestic violence, when application for federal aid is made by the legislature. But when the legislature cannot be convened, the executive of the state may call for such assistance. All executive officers of the several states are required to be bound by oath or affirmation to support the constitution of the United States. When vacancies happen in the representation of any state in congress, the executive authority thereof shall issue writs of election to fill such vacancies. And if vacancies happen in the senate, by resignation or otherwise, during the recess of the legislature of the state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

[50] City of Evansville v. State, 118 Ind. 426, 21 N. E. 267.

[51] U. S. v. Lytle, 5 McLean, 9, Fed. Cas. No. 15,652; State v. Hallock, 16 Nev. 373.

[52] People v. Salomon, 54 Ill. 39.

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CHAPTER XII.

JUDICIAL POWERS IN THE STATES.

126. System of Courts.
127. Constitutional Courts.
128. Statutory Courts.
129–130. Judges.
131–133. Jurisdiction.
134. Process and Procedure.

SYSTEM OF COURTS.

126. The judicial power of each state is vested in a system of courts, comprising, generally, three classes—

(a) A court of last resort, possessing supreme appellate jurisdiction.

(b) A number of courts of equal and co-ordinate authority, each within its territorial limits, possessing general original jurisdiction, civil and criminal.

(c) Inferior courts, held by justices of the peace or police magistrates, possessing jurisdiction of minor civil causes and petty criminal offenses.

The system of courts, in respect to its details, varies very greatly in the different states, but in its main features there is a marked similarity of plan. The general design is to establish one court of last resort, which shall have final appellate jurisdiction over all the rest, and a series of inferior courts, territorially distributed throughout the state, possessing general original jurisdiction, civil and criminal, together with certain courts of greatly restricted powers, and usually proceeding without a jury, which are intended for the trial and determination of minor causes. The court of last resort is sometimes called the "supreme" court, sometimes the "court of appeals," sometimes the "court of errors and appeals," and there are some other variations of these names. This court, as a rule, is vested with very narrow original jurisdiction, but with the ultimate

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appellate jurisdiction, both in civil and criminal causes. It also has power to issue various prerogative writs, or other extraordinary remedies, such as the writs of habeas corpus, certiorari, mandamus, injunction, quo warranto, and writs of error.

High original jurisdiction is vested in a series of courts, which are called "superior courts," "circuit courts," "district courts," "general terms of the supreme court," or "courts of common pleas." These courts possess general original jurisdiction of all suits, actions, and judicial proceedings. In some states, they are also vested with jurisdiction in equity; in others, there is a separate system of chancery courts. Criminal jurisdiction is vested also in these courts, though in some states they are designated by other names when sitting on the criminal side, such as courts of "oyer and terminer," courts of "quarter sessions," or courts of "general jail delivery." Courts of this class also possess appellate jurisdiction, in some states, from the inferior courts, such as justices of the peace, probate courts, or municipal courts.

Another series of courts is vested with the jurisdiction of the probate of wills, the granting of letters testamentary, and the settlement of the estates of decedents, and generally of the appointment of guardians for minors and the settlement of their accounts. These courts are variously called "probate courts," "surrogates' courts," "orphans' courts," or "courts of ordinary."

Justices of the peace are found in all the states, and they are privileged to hold courts for the determination of civil cases of minor importance, their jurisdiction being usually limited to cases in which the amount involved does not exceed a certain small sum, or where the title to real estate does not come into controversy. They are also conservators of the peace, and possess the powers of committing magistrates, and also, in some states, final jurisdiction over minor offenses and breaches of the peace.

In many of the states, there are established courts in the larger cities, called "municipal courts," which are invested with a minor civil jurisdiction similar to that of justices of the peace, usually limited to a small sum, and sometimes concurrent, up to that limit, with the jurisdiction of the circuit or district courts. They usually possess jurisdiction in criminal cases, extending to the final trial of minor offenses, such as violations of municipal ordinances or

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breaches of the peace, which are not triable by jury, and jurisdiction in graver cases to make a preliminary investigation and hold the offender to bail. In some states, they also have appellate jurisdiction over the justices of the peace.

The "police courts" found in some of the states are very similar to the municipal courts just mentioned, except that, as a general rule, they have no civil jurisdiction, being confined to the trial of petty criminal offenses and the preliminary inquiry into felonies and high misdemeanors.

The foregoing general view makes no mention of various courts which are peculiar to one or a few of the states. The state judiciary systems, as already observed, are marked by great diversities in the details. And the limits of the present work do not admit of a review of the powers of such courts as the "corporation courts," "hustings courts," "mayor's courts," "parish courts," "prerogative courts," "recorders' courts," and others, existing only in a few of the states.[1]

CONSTITUTIONAL COURTS.

127. Such courts as are provided for in the constitution of the state can neither be abolished nor changed by the legislature. And whatever jurisdiction is intrusted to them by the constitution is beyond the reach of the legislature; it can neither be added to, diminished, nor modified. But the manner of its exercise may be regulated by statute.

The judicial department being an independent and co-ordinate branch of the state government, the constitutions do not leave the judicial power to be prescribed and regulated at the discretion of the legislature, but declare, with a greater or less degree of minuteness, in what courts it shall be vested, and place their powers and functions, with more or less precision, beyond the reach of the legislative will. When the constitution of the state provides that the judicial power of the state shall be vested in certain enumerated courts, they are thereby constituted an independent branch of the government, and placed without the limits of legislative interfer-

[1] For more detailed information the reader may consult Stim. Am. St. Law, §§ 550–559.

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ence or control. The legislature cannot lawfully abolish, either directly or indirectly, any constitutional court. The judiciary system, as defined in the constitution, can be changed only by a revision or amendment of the constitution. And when the organic law creates a court and prescribes its jurisdiction, its provisions are generally self-executing; that is, as the court does not owe its existence to the legislature, so also there is no necessity for the legislature to recognize it or invest it with jurisdiction in order to enable it to proceed to the exercise of its constitutional duties and powers.[2] Nor can the jurisdiction of the court, as fixed by the constitution, be abridged by the legislative body. For instance, if the jurisdiction of the court is co-extensive with the state, it cannot be territorially restricted by statute.[3] So also, it is not competent for the legislature to abolish or abridge the appellate jurisdiction given to any court by the constitution, either directly or by making the judgment of an inferior court final and conclusive.[4] But it is no infringement of the constitutional powers of an appellate court to regulate or point out the mode in which its power shall be exercised, as, when by appeal and when by writ of error.[5] And so the establishment, repeal, or alteration of the statute of limitations as to the time of appealing to the supreme court is within the lawful power of the legislature.[6] And a statute allowing intermediate appeals to inferior courts is not unconstitutional, provided the right of an ultimate appeal to the court of last resort, as contemplated by the constitution, is not taken away.[7] And if the legislature cannot abridge or restrict the jurisdiction conferred on any court by the constitution, so neither can it enlarge such jurisdiction, or grant any species of jurisdiction, where such enlargement or new grant would violate either the letter of the constitution or its plain design with reference to the particular court. For instance, where the intention of the fundamental law is that the supreme court shall possess and exercise an

[2] State v. Gleason, 12 Fla. 190.
[3] Com. v. Commissioners of Allegheny Co., 37 Pa. St. 237.
[4] Anderson v. Berry, 15 N. J. Eq. 232; Ex parte Anthony, 5 Ark. 358.
[5] Haight v. Gay, 8 Cal. 297.
[6] Page v. Matthews, 40 Ala. 547.
[7] Yalabusha County v. Carbry, 3 Smedes & M. 529.

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appellate jurisdiction, and all original jurisdiction is denied to it, or denied except in a few specified cases, and vested in other courts equally created by the constitution, in such case it is not within the power of the legislature to confer original jurisdiction upon that court.[8] And in general, where the jurisdiction of any particular court is limited by the fundamental law, it would be unconstitutional for the legislature to attempt to increase the boundaries of its jurisdiction. Thus if, under the constitution, justices of the peace have jurisdiction only of actions on contract, it is incompetent for the legislature to give them jurisdiction of actions for the invasion of the privileges of licensed ferries.[9] On the same principle, the legislature cannot confer appellate jurisdiction on courts which are restricted by the constitution to the exercise of original jurisdiction only.[10] Neither can the legislature confer upon one court the functions and powers which the constitution has conferred upon another.[11]

STATUTORY COURTS.

128. If the constitution empowers the legislature to establish inferior courts, it may create, abolish, or modify such courts at its own discretion, and adjust and control the limits of their jurisdiction, subject only to such limitations as may be found in the fundamental law.

The function of creating courts and investing them with jurisdiction is, generally speaking, constitutional rather than legislative. It is not within the general bounds of legislative power to erect tribunals of law. But the people, in adopting a constitution, may, and frequently do, leave it to the legislature to provide for the organization and jurisdiction of the inferior courts. But where the constitution declares that the judicial power shall be vested in certain courts which it names "and in such other courts as the legislature may from time to time establish," these words must

[8] State v. Bank of East Tennessee, 5 Sneed (Tenn.) 573; Ward v. Thomas, 2 Cold. (Tenn.) 565; State v. Jones, 22 Ark. 331.

[9] Gibson v. Emerson, 7 Ark. 172.

[10] Deck's Estate v. Gherke, 6 Cal. 666.

[11] Zander v. Coe, 5 Cal. 230.

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be taken as pointing only to a partition of judicial powers. They will not authorize the legislature to abolish any of the constitutional courts, or to divest them of their entire jurisdiction, or, in creating new courts, to invest them with jurisdiction exclusive of that of the constitutional courts, but the legislature may vest a portion of this jurisdiction or a concurrent jurisdiction, in courts from time to time established.[12] And such a grant of power to the legislature is broad enough to authorize the bestowal of judicial powers and functions, for special purposes, upon boards or bodies whose ordinary duties are not properly judicial. Thus, in Indiana, it is held that the legislature may erect the board of county commissioners into a court which shall have authority to adjudicate upon claims against the county.[13] And a general distribution, in the constitution, of the judicial power, not referring to courts-martial, would not be held to prohibit, by implication, the creation of such courts or the grant to them of power to punish by fine.[14] A discretionary power bestowed by statute on a court may be taken away, in any particular case, by a special act of the legislature, as well as generally by a general act.[15]

JUDGES.

129. The constitutions make provision for the security and independence of the judges in the exercise of their judicial functions.

130. While a constitutional court cannot be abolished by the legislature, a judge of a statutory court may be legislated out of office by the abolition of the court.

In some few of the states, the judges of the courts are appointed by the governor; but in a majority, they are elected by the qualified voters. But the constitutions, in fixing their term of office, and in prescribing their compensation and declaring that it shall

[12] Com. v. Green, 58 Pa. St. 226; Montross v. State, 61 Miss. 429; State v. Burton, 11 Wis. 51.

[13] State v. Board of Com'rs of Washington Co., 101 Ind. 69.

[14] People v. Daniell, 50 N. Y. 274; Alden v. Fitts, 25 Me. 488.

[15] People v. Judge of Twelfth Dist., 17 Cal. 547.

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not be increased or diminished during their continuance in office, secure their necessary independence, so far as concerns the interference or control of the legislative body.

It is a general rule of constitutional law, applicable to the judges of the courts as well as to other official persons, that when the constitution itself has created an office and fixed its term, and has also declared the grounds and mode for the removal of an incumbent of the office before the expiration of his term, the legislature has no power to remove or suspend the officer for any other reason or in any other mode.[16] As to whether a judge can be legislated out of his office by the abolition of the court to which he belongs, there has been some difference of opinion. But the weight of authority seems to teach that if the legislature has the power to abolish the court, it cannot be restrained from so doing by the consideration that a judge would thereby be deprived of his office in a mode not directly contemplated by the constitution. And where the judge has been elected by the legislature itself, the legislature may curtail the territory of his jurisdiction down to the constitutional minimum, although it thereby diminishes his compensation.[17]

JURISDICTION.

131. The judicial power of a state extends to all cases and controversies properly susceptible of judicial determination, except in so far as such cases or controversies have been withdrawn from the cognizance of the state courts by the federal constitution or acts of congress.

132. The jurisdiction of the state courts, in so far as it is fixed by their constitutions, is not subject to the regulation or control of the legislature.

133. It is not competent for the legislature to impose upon judicial officers duties which are not judicial in their nature.

The judicial power of a state differs from that of the United States in this: that while the latter is limited to such subjects,

[16] Lowe v. Com., 5 Metc. (Ky.) 237; State v. Emerson, 39 Mo. 80.

[17] Foster v. Jones, 79 Va. 642.

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and such controversies between such persons, as the constitution and acts of congress specifically enumerate, the former is general, and extends to all cases and judicial controversies, of every sort and description, and between all classes of persons, except only in so far as it is limited by the provisions of the federal constitution and the acts of congress relating to the jurisdiction of the national courts.

The judiciary system created by the federal constitution is entirely disconnected from and independent of the judiciary of the several states. Although the courts of the two systems exist side by side in the same territory, they are as independent as if they had been respectively established by two foreign nations. Each is entitled to the uninterrupted exercise of its own powers and functions. Neither may rightfully encroach upon the province of the other. Neither can define, limit, or interfere with the constitutional jurisdiction of the other. Congress has no power to confer jurisdiction or judicial powers, under the constitution, upon the courts of a state. Neither has a state legislature any power to bestow jurisdiction, powers, or functions upon the federal courts, or to impose duties upon them under local law, or to annul their judgments or determine their jurisdiction.[18] It has been made a question (but not yet decided) whether a state can grant jurisdiction to the courts of another state, or grant to another state the right to authorize her courts to act on certain matters within the first state, or to constitute a court in the first state to act upon the rights and property of the citizens of the other state therein.[19]

Whatever provisions may be found in the state constitution as to the jurisdiction of the courts, or as to the classes of subjects over which they shall have jurisdiction, the legislature is of course bound and limited by such provisions.[20] Thus, if, under the constitution, a given court has no jurisdiction of civil proceedings which are not suits, complaints, or pleas, the legislature cannot confer upon it jurisdiction of contested election proceedings.[21] Furthermore, there

[18] Ferris v. Coover, 11 Cal. 175; Ex parte Knowles, 5 Cal. 300; Greely v. Townsend, 25 Cal. 604; U. S. v. Peters, 5 Cranch, 115.

[19] See Eaton & Hamilton R. Co. v. Hunt, 20 Ind. 457.

[20] In re Application of Cleveland, 51 N. J. Law, 311, 17 Atl. 772.

[21] Gibson v. Templeton, 62 Tex. 555.

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is a very important limitation upon the power of the legislature in dealing with the courts, in this, that it is not competent to impose upon the judges, as such, any duties which are not strictly judicial in their nature. Such was the decision in regard to an early act of congress which required the judges of the circuit courts to examine and certify claims to pensions, their report to be subject to the supervision of congress or of an executive officer. This statute was resisted by the courts, and several of them filed opinions in which they refused to obey its behests, on the ground that it was an attempt to impose upon them duties not belonging to the judicial office, and also to make their judgments subject to the revision of congress or the executive department.[22] But the same objections do not apply to an act of congress requiring the judges of the circuit courts to appoint supervisors of elections, since this comes within the authority given to congress by the constitution to vest the appointment of inferior officers in the courts of law.[23] But if no similar power of appointment is found in the constitution of a state, it is not competent for the legislature to empower the courts to appoint election officers.[24] But since it is proper that the courts should have a voice in the selection of their own officers, it is proper to provide that in case of an undecided election for the office of clerk of the court, the court itself shall decide.[25] In pursuance of the same general principle it has been held that while the courts are bound to decide the cases duly submitted to them, they are not bound to give written opinions, and the legislature has no power to compel them to do so.[26] And some of the appellate courts have refused to obey statutes requiring them to prepare the syllabi to their reported decisions. As a corollary to this general proposition it also follows that the judicial powers must be confined to the courts proper, and that it is not competent for the legislature to confer powers which are essentially judicial upon persons or officers who are not recognized by the constitution or statutes as courts or judges.

[22] Hayburn's Case, 2 Dall. 409; U. S. v. Todd, 13 How. 52, note; U. S. v. Ferreira, 13 How. 40.

[23] In re Supervisors of Election, 2 Flip. 228, Fed. Cas. No. 13,628.

[24] In re Supervisors of Election, 114 Mass. 247.

[25] Lewis v. State, 12 Mo. 128.

[26] Houston v. Williams, 13 Cal. 24.

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Thus, a statute giving to masters in chancery authority to grant writs of habeas corpus would be unconstitutional for this reason.[27] And the same is true of a law authorizing clerks of courts to fix the amount of bail.[28] But a statute providing for the appointment of referees is not unconstitutional on the ground of creating a diversion of judicial power from its legitimate channels, for referees are subordinate officers of the courts.[29]

PROCESS AND PROCEDURE.

134. Subject to the limitation that the lawful powers of the courts must not be infringed and that the vested rights of individuals must not be interfered with, the process, practice, forms, remedies, and procedure in the courts are subject to the regulation of the legislature at its own discretion.

The constitution is seldom violated by any statute which has relation merely to the form or method of conducting judicial business. Some restrictions, however, may be found in the constitutions of some of the states, and it is scarcely necessary to observe that they must be strictly heeded by the legislative body. Thus, the legislature cannot prescribe a form of process at variance with that prescribed by the state constitution; as, for instance, if the constitution directs that every summons shall run in the name of the people, a summons in the form specified by a statute, but not in the name of the people, is defective.[30] So the legislature has the power reasonably to regulate, but not to abolish, either directly or indirectly, the use of the writ of certiorari.[31] The legislature can constitutionally authorize an execution issued by a city or county court to run throughout the state.[32] And it may authorize judges of the superior courts to hold special terms at their discretion,[33] or

[27] Shoultz v. McPheeters, 79 Ind. 373.
[28] Gregory v. State, 94 Ind. 384.
[29] Carson v. Smith, 5 Minn. 78 (Gil. 59).
[30] Manville v. Battle Mountain Smelting Co., 17 Fed. 126.
[31] State v. Mayor, etc., of Jersey City, 42 N. J. Law, 118.
[32] Hickman v. O'Neal, 10 Cal. 292.
[33] Grinad v. State, 34 Ga. 270.

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authorize the courts to review their own decrees in equity after the expiration of the term at which the decree was made.[84] But a case which has been submitted for decision to a court of record is not subject to any control by the legislature.[85]

[84] Longworth v. Sturges, 4 Ohio St. 690.
[85] Lanier v. Gallatas, 18 La. Ann. 175.

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CHAPTER XIII.

LEGISLATIVE POWER IN THE STATES.

135. Organization and Government of Legislature.
136. Legislative Power of States in General.
137–139. Limitations Imposed by the Federal Constitution.
140. Implied Limitations in State Constitutions.
141. Private, Special, and Local Legislation.
142–143. Delegation of Legislative Powers.
144–145. Enactment of Laws.
146–148. Title and Subject-Matter of Statutes.

ORGANIZATION AND GOVERNMENT OF LEGISLATURE.

135. By constitutional provisions in the several states, or by common parliamentary law, the state legislature has the power—

(a) To make rules for its own government and for the regulation of its legislative proceedings.

(b) To choose its own officers in each house.

(c) To exercise an exclusive right of determination upon the election and qualification of its own members.

(d) To control and discipline its members, for disorderly or contemptuous behavior, even to the extent of expelling them.

(e) To appoint committees and define their powers, and authorize them to send for persons and papers in the course of their investigations.

(f) To punish persons who may be guilty of contempts against it or breaches of its privileges.

(g) To secure the uninterrupted service of all its members on the public business, by the exemption of each member from arrest on civil process while engaged in parliamentary duties or while going to or returning from the seat of government.

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(h) To keep, in each house, a journal of its proceedings, the publication and amendment of which are within its power and discretion.

Rules of Procedure.

The power of a legislative body to make rules for its own government necessarily includes the power to grant members leave of absence, to excuse them from voting, when proper, and to recognize what are called, in parliamentary language, "pairs."[1] The state constitution sometimes fixes the number of members of either house who shall constitute a quorum for the transaction of business. If it does not, the number may be fixed by a rule of the house. In the absence of either a constitutional provision or a rule, the general rule is that a majority of the members of the house will constitute a quorum.[2]

Officers.

As a general rule, each house of the legislature has the power to choose its own officers, although, in some states, the power of the senate or upper house to choose its presiding officer is taken away by the constitutional assignment of that position to the lieutenant governor. Besides the presiding officer, each house of a state legislature generally elects a clerk, sergeant at arms, and doorkeeper.

Election and Qualification of Members.

The power to determine whether a person claiming to be a state senator or representative was duly elected and is qualified to take his seat belongs exclusively to that branch of the legislature of which he professes to be a member. And its decision of the question cannot be challenged or inquired into by the executive or the judicial department.[3] And it is held that the constitutional requirement which obliges the members of each house to take the oath to support the constitution is merely directory, at least to the extent that the omission to take the oath does not affect the validity of the statutes passed by them.[4] But the constitutional provision

[1] Wise v. Bigger, 79 Va. 269.
[2] State v. Ellington, 117 N. C. 158, 23 S. E. 250.
[3] People v. Mahaney, 13 Mich. 481; Opinion of the Justices, 56 N. H. 570.
[4] Hill v. Boyland, 40 Miss. 618.

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that each house shall judge of the election and qualification of its own members does not prevent a court, on application by one claiming to be elected to the legislature for a mandamus to compel the canvassing board to issue to him a certificate of election, from determining whether or not he is eligible to the office.[5]

Expulsion of Members.

The power of expelling members for adequate cause is generally granted in the constitution, but it would necessarily exist even without constitutional sanction, as it is a power which is indispensable for the proper discharge of those functions for which the legislature is created. The reasons for the expulsion, and the question whether the member was duly heard before sentence was passed upon him, cannot be inquired into by the courts in any collateral proceeding.[6]

Punishment of Contempts.

In most of the states, the constitution gives power to each house of the legislature to punish its own members for disorderly conduct; and in many, by constitutional grant of authority, either house may punish any person not a member for disorderly or contemptuous conduct, though such punishment must not extend beyond the final adjournment of the session. But no American legislative body may claim such plenary power to punish for contempt as is possessed by the higher courts of justice. It seems clear that any person who violates the privilege of a member from arrest is in contempt of the house, and may be punished therefor by common parliamentary law. Again, any person guilty of violent, tumultuous, or disorderly behavior in the presence of the house is certainly liable to punishment. But, beyond this point, the power of legislative bodies to punish for contempts is not very clearly settled. The question of the extent of this power chiefly arises when it is sought to compel a witness to appear before a house of the legislature, or a committee of the same, and answer questions. In the case of congress, this power depends upon the nature of the inquiry conducted by the committee. If the inquiry relates to the organization or government of the house, the election or qualifica-

[5] People v. State Board of Canvassers, 129 N. Y. 360, 29 N. E. 345.

[6] Hiss v. Bartlett, 3 Gray (Mass.) 468.

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tion of its members, the observance of its lawful rules, the privilege of its members, or to impeachment proceedings, it is within the jurisdiction of the house, and the witness may be punished if contumacious. But the courts are unwilling to extend the power beyond these limits.[7] In regard to the state legislatures, the power to punish for contempt apparently extends to all cases of witnesses before the house or a committee where the subject of investigation is properly legislative; that is, where it relates to the organization or government of the house, the election or privileges of its members, or some subject of intended or contemplated legislative action. Thus, a committee trying a contested election of a member of the house may summon witnesses, and if they refuse to appear, or to answer proper questions, they are in contempt of the house and may be punished.[8] In a recent case it was held that a resolution of the United States senate appointing a committee to investigate newspaper charges of bribery and corruption of senators in connection with certain items of a tariff bill then pending, and to ascertain whether any senator had been or was engaged in speculating in stocks likely to be affected by such items, embraced a matter properly and constitutionally within the cognizance and jurisdiction of the senate; and a witness before such committee, refusing to answer proper and pertinent questions, was rightly punished for his contumacy.[9] In another case it was ruled that an inquiry who, if any one, had violated a rule of the senate which requires that all treaties laid before them shall be kept secret until the senate shall take off the injunction of secrecy, is a matter within the jurisdiction of the senate; and a witness summoned before the senate on such an inquiry, who refuses to respond

[7] See Kilbourn v. Thompson, 103 U. S. 168. Congress has enacted a law (Rev. St. U. S. § 102) that any person who, being summoned to appear as a witness before either house or a committee of either house, to give testimony or produce papers upon any matter under inquiry by the house, shall willfully make default, or who, having appeared, refuses to answer any pertinent question, shall be guilty of a misdemeanor, and punished by fine and imprisonment. The constitutionality of this act has been sustained. Chapman v. U. S., 5 App. Cas. D. C. 122.

[8] In re Gunn, 50 Kan. 155, 32 Pac. 471.

[9] Chapman v. U. S., 5 App. Cas. D. C. 122. And see Ex parte McCarthy, 29 Cal. 395.

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to proper questions put to him, may be punished for contempt.[10] But an investigation instituted by a house of the legislature for the mere purpose of discovering certain facts, or for political purposes, not connected with any intended legislation or other matters upon which the house could act, is not a legislative proceeding, and a witness cannot be compelled to appear and answer questions.[11] And it should be remembered that it is always the privilege of the citizen to be excused from responding to any questions the answers to which might tend to criminate him or furnish a link in a chain of criminal evidence against him. And what the courts cannot compel him to do, in this respect, cannot be required of him by a legislative body or one of its committees.[12] It has also been held that congress cannot compel the production of private books and papers of citizens for its inspection, except in the course of judicial proceedings or in suits instituted for that purpose, and then only upon averments that its rights in some way depend upon the evidence therein contained. Consequently a committee of congress, or a commission appointed by it, cannot compel a private person thus to exhibit his books and papers for their examination, nor punish him for contumacy or contempt if he refuses to obey their command in that behalf.[13] A person who has been punished by imprisonment for a contempt of a house of the legislature cannot maintain an action in damages against the members who voted to punish him, or the sergeant at arms who obeyed the command of the house, as for an unlawful and malicious arrest and imprisonment.[14]

Privilege of Members from Arrest.

The constitutions of most, if not all, of the states provide that members of the legislature shall be privileged from arrest, except for treason, felony, or breach of the peace, while in attendance upon a session of the legislature; and in some states this privilege also embraces the time which may be reasonably required by them for going to and returning from the place of meeting of the legisla-

[10] Ex parte Nugent, 1 Am. Law J. (N. S.) 107, Fed. Cas. No. 10,375.
[11] People v. Keeler, 99 N. Y. 463, 2 N. E. 615.
[12] Emery's Case, 107 Mass. 172.
[13] In re Pacific Railway Commission, 32 Fed. 241.
[14] Canfield v. Gresham, 82 Tex. 10, 17 S. W. 390.

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ture. In some states, though not all, the members are also exempt from service of any civil process. This is the case, for example, by constitutional provision, in Kansas, and it is there held that service of original process upon a member during the session is entirely void, and gives the court no jurisdiction over the person of such member.[15] But, if the constitutional privilege extends only to arrest on a charge of crime, this will not prevent the service of a summons or other process in a civil action, not involving the arrest and detention of the person of the legislator.[16] It would, however, prevent his being taken upon a capias, or the service of any writ the disobedience to which would be punishable by attachment of the person.

Journals.

In nearly all the states the constitutions provide that each house of the legislature shall keep a journal of its proceedings, and publish the same, excepting such parts as may require secrecy. The journal is a daily record of the proceedings of the house. It is kept by the secretary or clerk, and in it are entered the appointment and action of committees, the introduction of bills, motions, the votes and resolutions of the house, and such other matters as the house may direct to be spread upon the journal, in the order of their occurrence. It is held in some states that it is not permissible to go behind an enrolled statute, in seeking to show that it was not duly passed. But in other states (probably a majority) it is considered that, if an allegation is put forward that the act in question was not passed by the legislature in the form and manner required by the constitution, recourse may be had to the journals of the legislature to determine the question. Thus it is said: "Acts of the legislature duly enrolled and signed by the officers of the two houses, and filed in the office of the secretary of state, with the approval of the governor thereon, are prima facie valid and authoritative laws; but the journals of the two houses that enacted them may be resorted to, to ascertain whether the mandatory requirements of the constitution have been complied with

[15] Cook v. Senior (Kan. App.) 45 Pac. 126.

[16] Rhodes v. Walsh, 55 Minn. 542, 57 N. W. 212; Gentry v. Griffith, 27 Tex. 461. But compare Miner v. Markham, 28 Fed. 387.

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by the legislature in their enactment; and if such journals show explicitly, clearly, and affirmatively that any essential constitutional requirement has not been complied with, or if they fail to show any essential step in the process of enactment that the constitution expressly requires them to show,—such, for example, as the entry of the ayes and noes upon the final passage of any bill in either house,—then such journals would prevail as evidence, and the enrolled bill, as evidence of the law, would have to fall." [17] But if the journal entries are ambiguous, or if they fail to show facts which the constitution does not expressly require them to show, this will not raise any presumption against the validity of the action of the legislature. On the contrary, the courts will presume that the legislature fully complied with the constitutional requirements, although the journals do not show the fact.[18] "The enrolled statute," says a learned court, "is very strong presumptive evidence of the regularity of the passage of the act embraced in it and of its validity, and it is conclusive evidence of such regularity and validity, unless the journals of the legislature show clearly, conclusively, and beyond all doubt that the act was not passed regularly and legally. If there is any room to doubt as to what the journals of the legislature show, if they are merely silent or ambiguous, or if it is possible to explain them upon the hypothesis that the enrolled statute is correct and valid, then it is the duty of the courts to hold that the enrolled statute is valid; but in this state, where each house is required by the constitution to keep and publish a journal of its proceedings, we cannot wholly ignore such journals as evidence. They must be given some weight in determining the regularity and validity of the passage of statutes; and therefore where there can be no room for doubt, from the evidence furnished by such journals, that the statute was not passed by a constitutional majority of the members of either house, then the courts may declare that the supposed statute was not legally passed and is invalid." [19] An act of congress, duly enrolled, signed

[17] State v. Hocker, 36 Fla. 358, 18 South. 767.

[18] State v. Illinois Cent. R. Co., 33 Fed. 730; Opinion of the Justices, 52 N. H. 622.

[19] State v. Francis, 26 Kan. 724. And see, to the same effect, Chicot County v. Davies, 40 Ark. 200; Glidewell v. Martin, 51 Ark. 559, 11 S. W. 882; Wise

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by the presiding officers of the two houses, approved by the President, and deposited in the department of state, cannot be invalidated by the mere fact that the journals of congress do not show that it was passed in the precise form in which it was authenticated and signed.[20] Further, it must be observed that, if recourse is had to the journals, their testimony must be taken as absolutely true and unimpeachable. What the journals do affirmatively state cannot be contradicted or modified by any extraneous evidence whatever.[21] And if the enrolled act and the journals together show a compliance with all the requirements of the constitution, no other or further evidence impugning the act can be received. Thus, in such a case, it is not permissible to show by parol that some of the members needed to make up the majority in favor of the bill were not duly elected or qualified.[22]

The legislature may at the same or a subsequent session correct its journals, by amendments which show the true facts as they actually occurred, when it is satisfied that by neglect or design the truth has been omitted or suppressed.[23]

Bribery of Legislators and Lobbying.

The attempt to bribe a member of the legislature is made a criminal offense, either by the constitution or a statute, in all the states, as is also the taking of a bribe by such member. Moreover, the law sets its face severely against lobbying. In two states this is made a felony by the constitution.[24] And in all, the courts refuse to lend their aid in the enforcement of contracts for lobby services, declaring all such agreements to be immoral and void. "A contract for lobby services, for personal [or political] influence, for mere importunity to members of the legislature or other official body, for bribery or corruption, or for seducing or influencing them,

v. Bigger, 79 Va. 269; Hunt v. State, 22 Tex. App. 396, 3 S. W. 233; Attorney General v. Rice, 64 Mich. 385, 31 N. W. 203.

[20] Field v. Clark, 143 U. S. 649, 12 Sup. Ct. 495.

[21] U. S. v. Ballin, 144 U. S. 1, 12 Sup. Ct. 507.

[22] State v. Smith, 44 Ohio St. 348, 7 N. E. 447, and 12 N. E. 829.

[23] Turley v. Logan Co., 17 Ill. 151.

[24] Const. Cal. art. 4, § 35; Const. Ga. art. 1, §§ 2, 5. The constitution of California, as above, defines "lobbying" as "the seeking to influence the vote of a member of the legislature by bribery, promise of reward, intimidation, or other dishonest means."

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for any other arguments or persuasions or inducements than such as bear directly and legitimately upon the merits of the pending application, is illegal and against public policy and void." [25] In a case before the supreme court of the United States it was said, after referring to a number of decisions: "The sum of these cases is: First, that all contracts for a contingent compensation for obtaining legislation, or to use personal or any secret or sinister influence on legislators, are void by the policy of the law. Second, secrecy as to the character under which the agent or solicitor acts tends to deception and is immoral and fraudulent; and where the agent contracts to use secret influences, or voluntarily, without contract with his principal, uses such means, he cannot have the assistance of a court to recover compensation." [26] It is even held that a contract stipulating a compensation for services to be rendered in procuring an act to be passed by the legislature for the benefit of the party promising to pay is contra bonos mores, and cannot be enforced, even though no improper means are alleged or shown to have been resorted to by the agent in obtaining the passage of the act.[27] And a contract by which one agrees to "use his utmost influence and exertions" to procure the passage of a bill is void as against public policy; for it tends directly to secret, corrupt, and improper tampering with legislative action.[28] On the same principle, an agreement by which one contracts to withdraw or withhold his opposition to a pending legislative measure, for a consideration in money or other thing of value, is void.[29]

But it does not follow that a person interested in pending legislation may not employ agents or attorneys to represent, in a proper manner and at a proper time and place, his reasons for desiring or opposing the passage of the bill. Such contracts are frequently made, and are valid at law, and perfectly consistent with

[25] McKee v. Cheney, 52 How. Prac. (N. Y.) 144. See, also, Sweeney v. McLeod, 15 Or. 330, 15 Pac. 275; Coquillard's Adm'r v. Bearss, 21 Ind. 479; 2 Pars. Cont. (8th Ed.) 878; Bish. Cont. § 499.

[26] Marshall v. Railroad Co., 16 How. 314.

[27] Gil v. Davis, 12 La. Ann. 219.

[28] Mills v. Mills, 40 N. Y. 543.

[29] Smith v. Applegate, 23 N. J. Law, 352. But compare Edwards v. Railway Co., 1 Mylne & C. 650.

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the nicest sense of honor.[80] "It is allowable," says the court in New York, "to employ counsel to appear before a legislative committee, or before the legislature itself, to advocate or oppose a measure in which the individual has an interest."[81] "We entertain no doubt that an agreement, express or implied, for purely professional services, is valid. Within this category are included drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced. They rest on the same principle of ethics as professional services rendered in a court of justice and are no more exceptionable."[82]

LEGISLATIVE POWER OF STATES IN GENERAL.

136. The rightful power of the legislature of a state extends to every subject of legislation, unless, in the particular instance, its exercise is forbidden, expressly or by necessary implication, by the constitution of the United States, a treaty, an act of congress, or the constitution of the state.

Under the system of government in the United States, the people of each of the states possess the inherent power to make any and all laws for their own governance. But a portion of this plenary legislative power has been surrendered by each of the states to the United States. The remainder is confided by the people of the state, by their constitution, to their representatives constituting the state legislature. At the same time, and by the same instrument, they impose certain restrictions and limitations upon the legislative power thus delegated. But state constitutions are not to be construed as grants of power (except in the most general

[80] Winpenny v. French, 18 Ohio St. 469.

[81] Lyon v. Mitchell, 36 N. Y. 235; Sedgwick v. Stanton, 14 N. Y. 289.

[82] Trist v. Child, 21 Wall. 441. And see Yates v. Robertson, 80 Va. 475; Denison v. Crawford Co., 48 Iowa, 211; Coquillard's Adm'r v. Bearss, 21 Ind. 479.

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sense), but rather as limitations upon the power of the state legislature. From these principles it follows that the legislature of a state may lawfully enact any law, of any character, on any subject, unless it is prohibited, in the particular instance, either expressly or by necessary implication, by the provisions of some law which it is bound to regard as supreme. These laws of supreme authority, in which alone are to be sought the limitations of legislative power in the states, are the constitution of the United States, treaties and acts of congress made under its authority, and the constitution of the particular state. No act of a state legislature can be pronounced ultra vires, unless it can be shown to be in contravention of the express terms or necessary implications of one or other of these instruments.[88]

LIMITATIONS IMPOSED BY THE FEDERAL CONSTITUTION.

137. The constitution of the United States imposes limitations or prohibitions of two kinds upon the legislative power of the several states, viz.:

(a) Implied.

(b) Explicit.

138. The implied limitations upon state legislative power are divisible into two classes:

(a) Those which grow out of the grant to congress of exclusive power to legislate on certain subjects.

(b) Those which are implied from the grant or guaranty of certain rights or privileges to the citizens of the United States, the citizens of the states, or the states as states.

139. The explicit limitations imposed by the federal constitution upon the legislative power of the states are as follows: No state shall—

(a) Enter into any treaty, alliance, or confederation, nor, without the consent of congress, enter into

[88] See McPherson v. Blacker, 146 U. S. 25, 13 Sup. Ct. 3; Giozza v. Tiernan, 148 U. S. 661, 13 Sup. Ct. 721; People v. Draper, 15 N. Y. 532; People v. Flagg, 46 N. Y. 401; Thorpe v. Railroad Co., 27 Vt. 140; Walker v. Cincinnati, 21 Ohio St. 14; Page v. Allen, 58 Pa. St. 338; Sears v. Cottrell, 5 Mich. 251.

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any agreement or compact with another state or with a foreign power.

(b) Grant letters of marque and reprisal.

(c) Emit bills of credit.

(d) Coin money, or make anything but gold or silver coin a tender in payment of debts.

(e) Pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts.

(f) Grant any title of nobility.

(g) Lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, unless with the consent of congress.

(h) Lay any duty of tonnage, except with the consent of congress.

(i) Keep troops or ships of war in time of peace.

(j) Engage in war, unless actually invaded or in such imminent danger as will not admit of delay.

(k) Establish or allow slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted.

(l) Make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

(m) Deprive any person of life, liberty, or property without due process of law.

(n) Deny to any person within its jurisdiction the equal protection of the laws.

(o) Assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave.

(p) Deny or abridge the right of citizens of the United States to vote, on account of race, color, or previous condition of servitude.

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Implied Limitations.

The implied limitations of the first class grow out of the fact that certain powers of lawmaking are granted to congress by the federal constitution, and some of these are exclusive. In such cases, the constitution implies that the several states shall not take any legislative action upon the subject-matter of such exclusive power of congress. These prohibitions have been discussed in connection with the powers of congress. An example of an exclusive power vested in congress is that which gives it the sole right to legislate for the government of the District of Columbia and the territories.

In the second class of implied prohibitions belong those which forbid the states to deprive the federal courts of any part of the jurisdiction conferred upon them by the constitution, or of the means of exercising that jurisdiction, and those which secure to the citizens of each state the privileges and immunities of citizens in the several states, and which provide for full faith and credit to be given to the public acts, records, and judicial proceedings of each state, and for the extradition of fugitives from justice, and also the guaranty to each state of a republican form of government. In each of these cases, the grant of rights or the guaranty carries with it an implied prohibition of any state legislation which would have the effect to deny it or derogate from its effectiveness.

Explicit Limitations.

Of the explicit limitations upon state legislative power enumerated above, some are of such importance, and involve so many principles and questions, that they require separate chapters for their full treatment. Others will be most appropriately discussed in connection with the guaranties of private and political rights, and can only be studied in connection with similar prohibitions laid upon the power of congress. The remaining limitations upon state power, found in the federal constitution and mentioned above, will now be considered in order.

But first, the reader must be again reminded that the various clauses of the federal constitution which impose restrictions, limitations, or prohibitions upon the exercise of legislative power were designed, generally, to guard the rights of the people against oppression on the part of that government which the constitution created, not

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against their own states. They are therefore to be considered as applicable only to the federal government, except in those cases where the states are explicitly mentioned. And this is particularly to be observed in regard to the first eight amendments.[34]

Treaties and Compacts.

The constitution gives to the general government the plenary and exclusive control over all our foreign relations and all our dealings as a nation among nations. Moreover, treaties made by the United States are the supreme law of the land, and it follows that the individual states are not only prevented from forming alliances or arranging treaty rights with foreign countries, but also that it is not within their lawful power to disregard or obstruct those which are made by the national government.[35] The use of the several words "treaty," "agreement," and "compact" shows "that it was the intention of the framers of the constitution to use the broadest and most comprehensive terms, and that they anxiously desired to cut off all connection or communication between a state and a foreign power"; and, in order to execute this evident intention, the word "agreement" must receive its most extended signification, and be so applied as to prohibit every agreement, written or verbal, formal or informal, positive or implied by the mutual understanding of the parties.[36] Thus, an act of the legislature of a state authorizing the surrender of fugitives from justice claimed by a foreign power as offenders against its laws, though not strictly a treaty, involves relations with such foreign power, and is to that extent an invasion of the paramount control over our foreign intercourse committed to congress by the constitution, and for that reason is void.[37]

But the states, with the consent of congress, may make compacts with each other. Such agreements have been made since the formation of the constitution, and, indeed, even before its adoption. For instance, in 1785, Maryland and Virginia entered into a com-

[34] See O'Neil v. Vermont, 144 U. S. 323, 12 Sup. Ct. 693; State v. Paul, 5 R. I. 185; Murphy v. People, 2 Cow. (N. Y.) 815; Pervear v. Com., 5 Wall. 475.

[35] Fellows v. Denniston, 23 N. Y. 420; In re Metzger, 1 Edm. Sel. Cas. 399.

[36] Holmes v. Jennison, 14 Pet. 540.

[37] U. S. v. Rauscher, 119 U. S. 407, 7 Sup. Ct. 234; People v. Curtis, 50 N. Y. 321.

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pact or treaty regulating the right of fishing in the Potomac river, which constitutes the boundary between them. This compact is still in force, not being abrogated by the constitution, and has recently been before the courts for interpretation.[38] It is open to some question whether the assent of congress is required to every possible kind of contract which two states might make with each other. It has been held that, with the consent of congress, the states may settle their disputed boundaries by compact or treaty.[39] But the opinion has lately been advanced that the consent of congress is not necessary to agreements between the states relating to matters in which the United States could have no possible interest or concern, which do not trench upon the national authority or the subjects committed to its exclusive control, nor involve the autonomy of any state or the nature or extent of its political power or influence. Thus, it is said, the mere selection of parties to settle a boundary line between two states, and a legislative adoption of their report by one of the states, does not amount to a "compact" or "agreement" between states, which they are forbidden by the constitution to make without the consent of congress, until the one state has adopted the report in consequence of its adoption by the other, nor even then, unless the boundary established leads to the increase or decrease of the political power or influence of the states affected.[40] The consent of congress to an agreement between states need not necessarily be manifested by an express assent to every proposition contained in the agreement, but the assent may be inferred from the legislation of congress on the subject.[41]

Letters of Marque.

The subject of letters of marque has been somewhat considered in connection with the war powers of congress.[42] It remains to add that the removal of this power from the field of state legislation, and the intrusting it exclusively to the general government, is a part

[38] See Ex parte Marsh, 57 Fed. 719.

[39] Poole v. Fleeger, 11 Pet. 185.

[40] Virginia v. Tennessee, 148 U. S. 503, 13 Sup. Ct. 728.

[41] Virginia v. West Virginia, 11 Wall. 39; Virginia v. Tennessee, 148 U. S. 503, 13 Sup. Ct. 728.

[42] See ante, p. 224.

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of that general policy which dictated the principle that the powers of peace and war, with all their concomitants, should not be left to the discretion and the varying interests or prejudices of the individual states, but should be lodged alone in the central government. If it were not for this prohibition, it would be in the power of any state, at any time, to involve the whole nation in a war. "It is true," says Story, "that the granting of letters of marque and reprisal is not always a preliminary to war or necessarily designed to provoke it. But in its essence it is a hostile measure for unredressed grievances, real or supposed, and therefore is most generally the precursor of an appeal to arms by general hostilities. The security (as has been justly observed) of the whole Union ought not to be suffered to depend upon the petulance or precipitation of a single state." [43]

Bills of Credit.

The history of paper currency during the revolution, with its inevitable and serious depreciation, and the public discredit which ensued, furnished the reason for the introduction into the constitution of a prohibition against the issue of bills of credit by the states. Not every species of evidence of debt put forth by a state comes within the description of bills of credit. The term does not include bonds issued by a state, or warrants for the payment of services out of a specific fund. "To constitute a bill of credit within the constitution, it must be issued by a state, on the faith of the state, and designed to circulate as money. It must be a paper which circulates on the credit of the state, and so received and used in the ordinary business of life." [44] A bill drawn on a state, the payment of which is to be made out of a fund pledged therefor, is not a bill of credit, within the meaning of this clause.[45] And bills issued by a banking corporation which has a paid-up capital and may be sued upon its debts, are not to be deemed bills of credit, even though the state owns the entire stock of the bank, and the legislature elects the directors, and the faith of the state is pledged for the redemp-

[43] 2 Story, Const. § 1356.

[44] Briscoe v. Bank of Kentucky, 11 Pet. 257; Craig v. Missouri, 4 Pet. 410; Woodruff v. Trapnall, 10 How. 190; Central Bank of Georgia v. Little, 11 Ga. 346.

[45] Gowen v. Shute, 4 Baxt. (Tenn.) 57.

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tion of the bills, and they are made receivable for all public dues.[46] This prohibition of the constitution, though it declares only that "no state" shall issue such bills, applies with equal force to the case where two or more states confederate together and on their joint faith and credit issue bills of the forbidden character.[47]

Coining Money—Legal Tender.

Under the articles of confederation, the several states possessed the power to coin money, as well as the United States. This appears from the language of the ninth article, where it is provided that "the United States in congress assembled shall have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority or by that of the respective states." But under the constitution, this power is removed from the states, not only by the grant of the power to coin money to congress, but also by the prohibition of it to the states. While the states may neither emit bills of credit nor make anything but gold and silver coin a tender in payment of debts, yet neither of these restrictions will prevent them from granting charters of incorporation to banking companies and authorizing them to issue their bills, intended to circulate as money, provided that such bills are issued upon the credit of the banks alone and not upon the faith of the states, and that it is not attempted to give them the character of legal tender notes.[48]

Duties on Imports and Exports.

The prohibition against state taxation of imports and exports is one of those provisions of the constitution which are designed more effectually to commit to the national government the entire control of foreign and interstate commerce. It was apparently deemed necessary to concede to the states a very limited power of taxation in this regard, for the purpose of allowing them to make and execute inspection laws. But so jealously was this concession restricted that all temptation to the states to encroach upon the limits set for them was taken away by the provision that the "net proceeds" of all duties so laid "shall be for the use of the treasury of the United States."

[46] Darrington v. Bank of Alabama, 13 How. 12; Briscoe v. Bank of Kentucky, 11 Pet. 257; Curran v. Arkansas, 15 How. 304.

[47] Baily v. Milner, 35 Ga. 330.

[48] Miller, Const. 583.

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Inspection laws are such as authorize and direct the inspection and examination of various kinds of merchandise intended for sale, or for exportation, especially food, with a view to ascertaining its fitness for use and excluding unwholesome or unmarketable goods from sale or exportation.[48] The word "imports" as here used is construed as having reference only to goods imported from foreign countries, and it is not applicable to such as are merely transported from one state into another.[50] But the authority of the states to tax property brought into them from other states is restrained by another clause of the constitution, namely, that which grants to congress the power to regulate commerce. As to articles imported from foreign countries, it is held that they do not lose their character as imports, so as to become subject to state taxation as a part of the general mass of property in the state, until they have either passed from the control of the importer or have been broken up by him from the original cases, packages, or bales in which they were imported. Before this is done, any state tax upon them is void, whether it is imposed upon them distinctively as imports or as constituting a part of the importer's property.[51] In regard to the taxation of exports, the chief difficulty has been in the determination of the point of time at which goods cease to be a part of the general mass of prop-

[48] 1 Story, Const. § 1017. In order to make the law an "inspection law," it is not necessary that it should make provision for opening the package containing the article and examining the quality of its contents. To prepare the products of the state for exportation, it may be necessary that such products should be put in packages of a certain form, and of certain prescribed dimensions, either on account of the nature and character of the products, or to enable the state to identify the products of its own growth, and to furnish the evidence of such identification in the markets to which they are exported. And a law which provides for an official inspection, to ascertain whether the goods are thus prepared for export, and charges a reasonable fee to cover the cost thereof, is an inspection law within the meaning of the constitution. Turner v. Maryland, 107 U. S. 38, 2 Sup. Ct. 44. But a state cannot, under the guise of enacting inspection laws, make discrimination against the products and industries of other states and in favor of its own products and industries. Voight v. Wright, 141 U. S. 62, 11 Sup. Ct. 855. And see Foster v. New Orleans, 94 U. S. 246.

[50] Woodruff v. Parham, 8 Wall. 123; Almy v. California, 24 How. 169; Hinson v. Lott, 8 Wall. 148.

[51] Brown v. Maryland, 12 Wheat. 419; Low v. Austin, 13 Wall. 29

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erty in the state and assume the distinctive character of exports. The result of the authorities may be stated in the following general rule: Goods produced in a state are not entitled to exemption from its tax laws merely because it is the intention of the owner that they shall be exported to another state or to a foreign country, or even because they have been partially prepared for that purpose by being deposited at a place of shipment. But in this case they must be taxed as other property in the state, of the same kind, is taxed, and it is not admissible to discriminate in taxation between articles intended for consumption within the state and those sold or intended to be taken into another. And the distinctive character of "exports" does not attach to the goods until they have been shipped, or entered with a common carrier for transportation to another state or foreign country, or have been started upon such transportation in a continuous route or journey.[52]

Duties of Tonnage.

The object of this prohibition was to prevent the states from burdening or interfering with foreign and interstate commerce by the indirect method of taxation. The imposition of a tonnage duty is taxation, but it also amounts to a regulation of commerce. The tonnage of a vessel is a measure of its size and carrying capacity; it is the measure of the ship's internal cubical capacity, estimated in tons of one hundred cubic feet each, measured in a particular manner. The supreme federal court has decided that "a duty of tonnage, within the meaning of the constitution, is a charge upon a vessel, according to its tonnage, as an instrument of commerce, for entering or leaving a port, or navigating the public waters of the country; and the prohibition was designed to prevent the states from imposing hindrances of this kind to commerce carried on by vessels.[53] The prohibition, therefore, amounts to this, that the states must not lay duties upon vessels, according to their tonnage, by way of exaction for the privilege of being employed as instruments of commerce or for such privileges as are indispensable to that employment.[54] But this does not preclude the states from

[52] Coe v. Errol, 116 U. S. 517, 6 Sup. Ct. 475; Turpin v. Burgess, 117 U. S. 504, 6 Sup. Ct. 835; Jackson Min. Co. v. Auditor General, 82 Mich. 488.

[53] Huse v. Glover, 119 U. S. 543, 7 Sup. Ct. 313.

[54] State Tonnage Tax Cases, 12 Wall. 204; Inman Steamship Co. v. Tinker,

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taxing vessels as property, or rather, from taxing the owners of vessels, in respect to their property therein, when the vessels are subject to the taxing power or have their home situs within its limits; this is not an interference with commerce, but a lawful exercise of the general power of taxation.[55] And a statute which requires the payment of wharfage dues from vessels making fast to the wharves and discharging cargo thereat, is not obnoxious to the constitutional prohibition, even though such wharfage dues are graduated according to the tonnage of the vessel. The reason is that wharfage dues are not taxes or duties, nor do they amount to a regulation of commerce.[56] Furthermore, it has been decided that where a state statute requires every vessel passing a quarantine station to pay a certain fee for examination as to her sanitary condition, this is to be regarded as a part of the quarantine system and a compensation for services rendered to the vessel, and not as a tax, within the meaning of the constitutional limitation in respect to tonnage duties.[57]

Keeping Troops—Engaging in War.

"No state shall, without the consent of congress, keep troops or ships of war in time of peace, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay." These clauses of the constitution must be regarded as correlative to those which grant to congress the power to declare war and to maintain armies and navies. The general purpose of the whole is to invest the entire power of making war, and of maintaining a military equipment, in the national government, and to put it beyond the power of the states to enter upon hostilities with each other or with foreign nations. These provisions, says Justice Miller, "are designed to incapacitate the states from making war against each

94 U. S. 238; Steamship Co. v. Port Wardens, 6 Wall. 31; Peete v. Morgan, 19 Wall. 581; Transportation Co. v. Wheeling, 99 U. S. 273.

[55] Peete v. Morgan, 19 Wall. 581.

[56] Packet Co. v. Keokuk, 95 U. S. 80; Transportation Co. v. City of Parkersburg, 107 U. S. 691, 2 Sup. Ct. 732; Cannon v. New Orleans, 20 Wall. 577; Packet Co. v. Catlettsburg, 105 U. S. 559; St. Louis v. Ferry Co., 11 Wall. 423; Vicksburg v. Tobin, 100 U. S. 430.

[57] Morgan's L. & T. R. & S. S. Co. v. Louisiana Board of Health, 118 U. S. 455, 6 Sup. Ct. 1114.

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other or against the general government, or from putting themselves in a position to defy that government and overthrow its authority, withdrawing from them at the same time the power to do this successfully and discouraging the inclination to attempt it. The only war power which a state can exercise is one of defense, when actually invaded or in the most imminent danger of such invasion." [58] But if a state should be precipitated into a war by an actual invasion, or imminently threatened therewith, it would undoubtedly be within its lawful power to meet the emergency by proceeding to raise an army, even without waiting for the consent of congress. And it must be observed that the "troops" here intended are such as constitute a stipendiary or standing army. The prohibition was not aimed at, nor does it affect, the militia of a state. This is proved by those parts of the constitution which recognize the militia forces of the states, as by providing that congress may call them forth to execute the laws of the Union or suppress insurrection, and that the President shall be their commander in chief when they are in the actual service of the United States, and the declaration in the second amendment that "a well regulated militia is necessary to the security of a free state."

IMPLIED LIMITATIONS IN STATE CONSTITUTIONS.

140. Beside the express limitations upon the legislative power imposed by the constitution of a state, there are certain limitations implied from the distribution of the functions of government, the nature of legislative power, and the boundaries of state authority.

(a) The legislature must not usurp the powers, or encroach upon the province, of the executive or judicial department.

(b) The legislature cannot give exterritorial validity to its enactments.

(c) The legislature cannot alienate or surrender the governmental powers, popular rights, or public property which it holds in trust for the people.

[58] Miller, Const. 595.

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(d) Public money cannot be expended, by appropriations from the treasury, for other than public purposes.

(e) Irrepealable laws cannot be passed, unless it be in the form of a contract founded upon a consideration.

Usurpation of Powers.

The rule that the legislature of a state may not lawfully usurp the powers or prerogatives of the other departments of the government, nor assume to invade the peculiar province of either, results from the general principle of the apportionment of the powers of sovereignty between the three great branches of the government. This principle, in its practical applications, was fully considered in an earlier chapter, to which the reader is now referred.[59]

Territorial Restriction.

The laws of a state can have no exterritorial validity. That is, a state has power to legislate only concerning such subjects as are within its physical limits or the confines of its jurisdiction, and concerning such persons as, by citizenship or inhabitancy, are within the sphere of its operations. Its laws cannot affect subjects of property which are beyond its limits, except in so far as its own people may have dealings with them. Nor can its laws affect citizens or inhabitants of other states or countries, except in so far as, by making a sojourn within the state, they make themselves amenable to its regulations, or invoke the aid and protection of its laws by dealing with property subject to its local jurisdiction or seeking the remedies afforded by its courts. This, then, constitutes an implied limitation upon the powers of a state legislature, but not because it is specifically prohibited by the constitution, but because what is beyond the power of the people of a state, as a whole, cannot be within the power of their representatives who are intrusted with the making of their laws. And, as a rule of interpretation, every statute is presumed to be intended to be confined in its operation to the persons, property, rights, or contracts which are within the territorial jurisdiction of the legislature

[59] See ante, pp. 73, 79, 80.

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which enacted it. The presumption is always against any intention to attempt giving to the act an exterritorial operation and effect.[60]

On this principle, it is held that the taxing power of a state is limited to persons and property within and subject to its jurisdiction. For instance, no state could impose taxes upon land lying within the confines of another state,[61] nor upon intangible personal property owned by nonresidents.[62] For the same reason, the civil damage laws—giving a right of action against liquor sellers to innocent parties who sustain injury by the intoxication of persons supplied with liquor by the defendants—have no exterritorial operation or effect.[63] And the same rule is applied in the case of the statutes, now quite common in the United States, which give a right of action for damages to the surviving family, or the personal representatives, of a person who has been killed by the wrongful act, omission, or default of another.[64]

The rights and jurisdiction of the several states over the sea adjacent to their coasts are those of an independent nation, except as qualified by any right of control granted to the United States by the constitution. And where, by the constitution and laws of a state, her boundaries and those of her counties are three miles from the shore, her statutes giving an action for death by negligence are operative within such boundaries, where death occurs by negligence in the navigation or towage of vessels.[65]

Legislature as a Trustee.

Another implied limitation upon the power of a state legislature may be found in the fact that it holds certain governmental

[60] Bond v. Jay, 7 Cranch, 350; Noble v. The St. Anthony, 12 Mo. 261; Ex parte Blain, 12 Ch. Div. 522; Jefferys v. Boosey, 4 H. L. Cas. 815; Hendrickson v. Fries, 45 N. J. Law, 555; The Ohio v. Stunt, 10 Ohio St. 582.

[61] Appeal of Drayton, 61 Pa. St. 172; Winnipiseogee Lake Cotton & Woolen Manuf'g Co. v. Gilford, 64 N. H. 337, 10 Atl. 849.

[62] Case of State Tax on Foreign-Held Bonds, 15 Wall. 317.

[63] Goodwin v. Young, 34 Hun (N. Y.) 252.

[64] Beach v. Steamboat Co., 30 Barb. (N. Y.) 433; Whitford v. Railroad Co., 23 N. Y. 465.

[65] Manchester v. Massachusetts, 139 U. S. 264, 11 Sup. Ct. 559; Humboldt Lumber Manufacturers' Ass'n v. Christopherson, 19 C. C. A. 481, 73 Fed. 239. And see Bigelow v. Nickerson, 17 C. C. A. 1, 70 Fed. 113.

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powers, and certain kinds of public property, in trust for the people. That the great powers of taxation and police are thus held under a trust which forbids their surrender by the legislature or their irrevocable alienation to private persons will fully appear from other parts of this work. And the application of a similar doctrine to property belonging to the people as a whole was made in the celebrated "Chicago Lake Front Case."[66] Herein it was stated that the title which a state holds to lands under tide waters bordering on the sea or under the navigable waters of the Great Lakes, lying within her limits, is different in character from the title of the state to lands intended for sale, or from that of the United States to the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, free from obstruction or interference by private parties. And it is not within the legislative power of the state to abdicate this trust by a grant whereby it surrenders its property and general control over the lands of an entire harbor, bay, sea, or lake, though it may grant parcels thereof for the foundation of wharves, piers, docks, and other structures in aid of commerce, or parcels which, being occupied, do not substantially impair the public interest in the waters remaining.

Appropriations, and Expenditure of the Public Money.

The control, administration, and disposition of the property and funds of the state, and the appropriation thereof to the payment of debts, are powers appertaining exclusively to the legislative department, and cannot be delegated to or exercised by the judicial or executive departments.[67] In most of the states, the constitutions provide that no money shall be drawn from the treasury except under appropriations duly made by law. An appropriation, as applicable to the general fund in the treasury, is an authority from the legislature, given at the proper time and in legal form to the proper officers, to apply sums of money out of that which

[66] Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 13 Sup. Ct. 110. But compare Sunbury & E. R. Co. v. Cooper, 33 Pa. St. 278.

[67] Carter v. State, 42 La. Ann. 927, 8 South. 836.

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may be in the treasury, in a given year, to specified objects or demands against the state.[68] No matter how just or equitable a claim against the state may be, no duty devolves upon the fiscal officers to pay the same, until an appropriation is made by law for that purpose.[69] In a few of the states, it is constitutionally provided that appropriations shall not be made for a longer term than two years. But, in the absence of such a specific restriction, the control of the legislature over this subject is plenary, and there is nothing to invalidate continuing appropriations; that is, those the payment of which is to be continued beyond the next session of the legislature.[70] Where, as is sometimes the case, the legislature is forbidden to make appropriations in excess of the revenue of the state, this requirement is mandatory; and it is the duty of public officers connected with the administration of the state finances to treat as void every appropriation in excess of the constitutional limits.[71]

Same—Bounties and Gifts to Private Persons.

It is a general principle of law that the money raised by taxation may not be appropriated and paid out of the public treasury for other than public purposes. Whether money appropriated by the legislature was intended for a public or a private purpose must be determined from the statute itself, and from such considerations as the court can judicially notice; and it is not competent to take proof and determine the question as a matter of fact.[72] But it is not always easy to determine the nature of the object of an appropriation, as public or private. For instance, it is unquestionably within the power of the legislature to maintain public charities. But it is often difficult to draw the line between a legitimate public charity and the expenditure of public money for the benefit of private persons. Thus, a statute of Massachusetts, authorizing the city of Boston to issue bonds and lend the proceeds on mortgage to the owners of lands, the buildings on which were destroyed

[68] Ristine v. State, 20 Ind. 328.

[69] Collier & Cleveland Lithographing Co. v. Henderson, 18 Colo. 259, 32 Pac. 417.

[70] In re Continuing Appropriations, 18 Colo. 192, 32 Pac. 272.

[71] Henderson v. People, 17 Colo. 587, 31 Pac. 334.

[72] Waterloo Woolen Manuf'g Co. v. Shanahan, 128 N. Y. 345, 28 N. E. 368.

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by the great fire of 1872, was held unconstitutional.[73] So an act authorizing townships, in districts where there had been a failure of the crops, to issue bonds, to supply the destitute with provisions and with grain for seed, was pronounced invalid.[74] And a similar decision was made with reference to an appropriation by the legislature for the benefit of sufferers from disastrous floods in a part of the state.[75] Nor can a municipal corporation raise money by taxation to reimburse its treasurer for a sum paid by him to the corporation to make good an amount of the public money of which he had been robbed.[76] And a legislative appropriation made to an individual in payment of a claim for damages on account of personal injuries sustained by him while in its service, and for which the state is not responsible, either on general principles of law or by reason of any statute, is a "gift" such as the legislature is forbidden to make.[77] So again, it is held that a law providing that persons planting prairie land with forest trees, and cultivating the same for three years, shall receive a bounty therefor, is unconstitutional.[78] But, on the other hand, the validity of the federal laws granting pensions to the disabled soldiers and sailors of the late war has never been questioned. And it is held that bounties offered for the destruction of wolves and other dangerous wild animals are valid and constitutional.[79] And, in those states where the question was raised, it was held that an appropriation of money from the state treasury, for the purpose of constructing buildings and collecting and maintaining an exhibit of the products and resources of the state at the World's Fair Columbian Exposition of 1893, was for a public purpose, and was lawful and valid.[80] And, in a recent decision of the United States supreme court, congress having offered a bounty upon sugar produced within the United

[73] Lowell v. Boston, 111 Mass. 454.

[74] State v. Osawkee Tp., 14 Kan. 418.

[75] Patty v. Colgan, 97 Cal. 251, 31 Pac. 1133.

[76] Bristol v. Johnson, 34 Mich. 123.

[77] Bourn v. Hart, 93 Cal. 321, 28 Pac. 951.

[78] Deal v. Mississippi Co., 107 Mo. 464, 18 S. W. 24.

[79] Dimmit Co. v. Frazier (Tex. Civ. App.) 27 S. W. 829; In re Bounties, 18 Colo. 273, 32 Pac. 423.

[80] Daggett v. Colgan, 92 Cal. 53, 28 Pac. 51; Norman v. Board, 93 Ky. 537, 20 S. W. 901.

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States, and then repealed the offer, it was held that sugar manufacturers who had in the meantime raised crops, and engaged in the making of sugar in the expectation of receiving the bounty, had a claim which imposed on the United States such an equitable and moral obligation as authorized the appropriation by congress of money for the payment of such bounties.[81]

Irrepealable Laws.

Every legislative body, unless restricted by the constitution, may modify or abolish the acts of its predecessors. And there is no way in which a legislative act can be made irrepealable, except it assume the form and substance of a contract.[82] Nor can one legislature be bound by the acts of another as to the mode in which it shall exercise its constitutional powers.[83]

PRIVATE, SPECIAL, AND LOCAL LEGISLATION.

141. In most of the states, the enactment of private, local, or special laws is forbidden by the constitution.

In some of the states, this restriction extends only to cases in which general laws could be made applicable. In others, many subjects are enumerated on which private or special legislation is forbidden. In several of the states, the prohibition is directed against the enactment of private or local statutes regulating the internal affairs of towns and counties. Many state constitutions also provide that charters of incorporation shall be granted only in accordance with general laws, and not by special acts of the legislature. In some of the states, a still different form is found, which provides that all laws of a general nature shall be uniform in their operation throughout the state. All these provisions are mandatory, and any laws which are found to be in violation of them will be declared unconstitutional by the courts.

The object of provisions of this sort is twofold. On the one hand, they are designed to deter the legislature from usurping judi-

[81] U. S. v. Realty Co., 163 U. S. 427, 16 Sup. Ct. 1120.
[82] Bloomer v. Stolley, 5 McLean, 158, Fed. Cas. No. 1,559.
[83] Brightman v. Kirner, 22 Wis. 54.

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cial functions and invading the peculiar province of the courts. And on the other hand, they are intended to prevent the enactment of laws characterized by favoritism, partiality, or invidious discriminations against persons or localities. A constitutional prohibition is needed to withdraw such power from the legislature. Where there is no constitutional restriction against the passage of private or local laws, they are within the legislative competency and the courts cannot hold them unconstitutional.[84] A private statute is one which operates only upon particular persons or private concerns.[85] And a law is "local" which, instead of relating to and binding all persons, corporations, or institutions to which it may be applicable, within the whole territorial jurisdiction of the law-making power, is limited in its operation to certain districts of such territory or to certain individual persons or corporations.[86] The fact that a statute is limited as to the time of its duration does not make it a local or special law, but such an act is termed a temporary one. A local or special statute is one limited in the objects to which it applies; a temporary statute is limited merely in its duration. Necessarily a local or special law may be perpetual, while a general law may be temporary.[87] A good illustration of laws of this objectionable character is found in a statute passed in Indiana in 1879, "legalizing the practice of circuit courts in entering judgments on the first day of the term." It was held to be unconstitutional, as being both local and special in its provisions. It was special because it did not apply to all judgments which might have been or might be taken on the first day of the term. And it was local because it did not in terms legalize the judgments of all the circuit courts of the state which had been theretofore taken on the first day of the term, but only of such of those courts as had "adopted rules of practice making the summons in civil causes returnable on the first day of the term."[88]

The prohibition against local and special laws is not to be evaded by merely calling the statute a general law. This device has many times been frustrated by the courts. A law which purports by its terms to be made for the whole state, but which then proceeds by

[84] Beyman v. Black, 47 Tex. 558.
[85] 1 Bl. Comm. 86.
[86] Kerrigan v. Force, 68 N. Y. 381.
[87] People v. Wright, 70 Ill. 388.
[88] Mitchell v. McCorkle, 69 Ind. 184.

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exceptions, reservations, or provisos, to withdraw from its operation all but one or a few persons, or a special class of persons, or all but one or a few cities or counties, is in reality a private or local law, and will be so declared by the judicial department.[89] Thus, an act which by its terms can have application to but one county within the state, although purporting to be a general law, applicable to all counties having a certain population, is special legislation.[90] But a law in relation to cities and villages is not necessarily a local or special law because there may be certain cities and villages, organized under special charters, to which it does not apply.[91] But an act relating to the fees of the sheriff of a single county is clearly a local act.[92] In Pennsylvania, it is held that the classification of the cities of the state according to their population (with reference to their form of government and their corporate powers) is a proper and constitutional method, and is not open to objection on the charge of being special legislation.[93] But it is also there ruled that an act excluding perpetually from its operation all counties containing more than 150,000 or less than 10,000 inhabitants is a local law; for the perpetual exclusion of certain counties from the operation of a law is not a classification of the counties.[94] In New York, where the constitution prohibits the passage of local or private bills for "laying out or opening roads, highways, or alleys," it is considered that this is not applicable to streets in cities.[95]

In those states where the constitution prohibits local or special laws only in cases where a general law could be made applicable, there has been some difference of opinion as to what department of the government is to determine whether or not a general law

[89] State v. Herrmann, 75 Mo. 340; State v. Mayor, etc., of Jersey City, 45 N. J. Law, 297; Belleville & I. R. Co. v. Gregory, 15 Ill. 20; Coutieri v. Mayor, etc., of New Brunswick, 44 N. J. Law, 58; Woodard v. Brien, 14 Lea (Tenn.) 520; City of Topeka v. Gillett, 32 Kan. 431, 4 Pac. 800.

[90] Devine v. Commissioners, 84 Ill. 590.

[91] Potwin v. Johnson, 108 Ill. 70; People v. Newburgh & S. Plank-Road Co., 86 N. Y. 1.

[92] Gaskin v. Meek, 42 N. Y. 186.

[93] Wheeler v. Philadelphia, 77 Pa. St. 338; Com. v. Patton, 88 Pa. St. 258.

[94] Morrison v. Bachert, 112 Pa. St. 322, 5 Atl. 739.

[95] In re Lexington Avenue, 29 Hun (N. Y.) 303.

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could have been made applicable to the case in point. The better opinion seems to be that while the legislature must determine this question in the first instance, yet their decision is not final or conclusive, but the courts must also consider and decide upon the applicability of a general law, when the act passed is regularly presented to them for review, and must decide upon its constitutionality according to their opinion of the facts.[96]

In some of the states, as above mentioned, the constitution contains a provision against the enactment of private or special laws "regulating the internal affairs of towns and counties." It is held that this applies equally to cities.[97] It is violated by a law which, while general in form, serves but to give a salary to a single officer of a single county,[98] as also by a statute conferring upon all cities having a population of not less than 25,000 the power of issuing bonds to fund their floating debt.[99] In those states where the legislature is prohibited from creating corporations by special act, or from conferring corporate powers by special law, this provision is understood as applying only to private corporations and not to municipal bodies.[100] It does not prohibit the legislature from passing a special act changing the name of an existing corporation and giving it the power to purchase the property and franchises of another existing corporation.[101] But an act granting rights to a single corporation in reference to specific property in a certain location is void under this prohibition.[102]

The other form of prohibition mentioned in the text (that requiring that all laws of a general nature shall be uniform in their operation) is quite different in its meaning and effects. It does not entirely forbid the enactment of local or special laws. A statute is understood to be general and uniform in its operation when it operates equally upon all persons who are brought within

[96] State v. Mayor, etc., of Newark, 40 N. J. Law, 71; People v. Allen, 42 N. Y. 378. Compare Board of Com'rs of St. Louis v. Shields, 62 Mo. 247.

[97] State v. Parsons, 40 N. J. Law, 1.

[98] Gibbs v. Morgan, 39 N. J. Eq. 126.

[99] State v. City of Trenton, 42 N. J. Law, 486.

[100] State v. Mayor, etc., of Newark, 40 N. J. Law, 71.

[101] Wallace v. Loomis, 97 U. S. 146.

[102] In re Union Ferry Co., 32 Hun (N. Y.) 82.

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the relations and circumstances provided for;[103] or when it applies equally to all person within the territorial limits described in it, although not applying to all parts of the state.[104] A revenue law, for example, is constitutional, so far as concerns this provision, if it affects, as nearly as possible, all persons and property alike; a revenue law which should be absolutely equal in its operation is an impossibility.[105] So an act fixing the rate of interest which may be charged by pawnbrokers is not in violation of this provision.[106]

The constitutions of many of the states contain provisions to the effect that there shall be no grant of special privileges, immunities, or emoluments to any citizen or class of citizens, unless in consideration of public services rendered. This, however, it is considered, has no reference to the private relations of the citizens, nor to the action of the legislature in passing laws regulating the domestic policy and business affairs of the people or any portion of them.[107]

DELEGATION OF LEGISLATIVE POWERS.

142. Legislative powers granted to the legislature by the constitution cannot be delegated by it to any other body or person.

143. This principle does not apply to—

(a) The grant to municipal corporations of legislative powers for local purposes.

(b) Local option laws.

(c) General laws which are to take effect upon a future contingency, other than ratification by popular vote.

Delegation of Legislative Powers Forbidden.

It is a general principle of constitutional law that the power conferred upon the legislature by the constitution to make laws

[103] McAunich v. Railroad Co., 20 Iowa, 338.

[104] Cordova v. State, 6 Tex. App. 207.

[105] People v. Coleman, 4 Cal. 46.

[106] Jackson v. Shawl, 29 Cal. 267.

[107] Williams v. Cammack, 27 Miss. 209. And see Smith v. Smith, 1 How. (Miss.) 102.

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cannot be delegated by that body to any other person or authority, in any such manner as to preclude the resumption of the power, or of its exercise, whenever the public interest requires it. The legislators are the agents or trustees of the people, and they have no right or power to place the trust irrevocably in other hands than their own.[108]

A good illustration of an unlawful attempt to delegate legislative power is found in a case in Minnesota, where a statute provided for the taking up of certain state bonds and issuing new ones in lieu of them; but it was doubtful whether this could be done legally without submitting the question to a vote of the people. The act therefore provided that the decision of this question should be left to the judges of the supreme court, or, in case they should decline to act, to an equal number of judges of the district courts, and that the matter should be submitted to the people, or not submitted, according as the judges decided. It was held that the act attempted to delegate legislative power to the judges mentioned, and was therefore unconstitutional.[109] On the same principle, the legislature cannot confer upon a private corporation power to enact by-laws contravening, repealing, or in any wise changing the statutory or common law of the state.[110] But this rule does not forbid the legislature to grant a franchise or right dependent on a condition of obtaining consent from another body. For instance, it may create a corporation with power to lay a street railroad, subject to the condition of obtaining the consent of the city to the use of the street.[111]

Municipal Corporations.

Municipal corporations are regarded as subordinate agencies of government, created with a view to the more judicious and effective administration of local governmental affairs. The legislature has

[108] Clark v. Mayor, etc., of Washington, 12 Wheat. 40, 54; Philadelphia v. Fox, 64 Pa. St. 169; Ex parte Cox, 63 Cal. 21; Brown v. Fleischner, 4 Or. 182; Rice v. Foster, 4 Har. (Del.) 479; Cincinnati, W. & Z. R. Co. v. Commissioners of Clinton Co., 1 Ohio St. 77.

[109] State v. Young, 29 Minn. 474, 9 N. W. 737.

[110] Seneca County Bank v. Lamb, 26 Barb. (N. Y.) 595.

[111] City of Philadelphia v. Lombard & S. St. P. R. Co., 4 Brewst. (Pa.) 14; Blanding v. Burr, 13 Cal. 343.

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power to erect such corporations, and to invest them with such powers and prerogatives as are necessary to enable them to make rules for the government of their own affairs, particularly in matters of taxation and police, provided that their by-laws and ordinances shall not be inconsistent with the general laws of the state. This is not to be regarded as an unlawful delegation of legislative power. For the legislature retains control over such corporations, to the extent that it may, in its discretion, resume or recall the powers granted out, unless in so far as these powers are secured to the municipalities by the constitution.[112] All statutes creating municipal corporations, or imposing liabilities upon them, or authorizing them to incur obligations or make improvements, may be referred to the people of the districts immediately affected, to decide by their votes whether they will accept the incorporation or assume the burdens. But the legislature must enact a complete and valid law according to the prescribed usages, and it must derive its whole vigor and vitality from the legislature, and no additional efficacy from the popular vote.[113] The enactment of a law comprising general and uniform regulations for cities, towns, and villages, throughout the state, and leaving to a popular vote in each municipality the question whether it shall become subject to such law, is not an unconstitutional delegation of legislative power.[114]

Local Option Laws.

A "local option" law is a law framed for the purpose of prohibiting, or severely restricting, the sale of intoxicating liquors, and containing a provision that the several counties, townships, or other divisions of the state, may hold elections to determine by popular vote whether they desire the law to be in force in their limits, and with a further provision that in each case where such election results in favor of the adoption of the law, it shall take effect in the district so voting, but that each district rejecting it shall continue

[112] People v. Pinckney, 32 N. Y. 377; State v. Noyes, 30 N. H. 279; Perry v. City of Rockdale, 62 Tex. 451.

[113] Lammert v. Lidwell, 62 Mo. 188; Clarke v. Rogers, 81 Ky. 43.

[114] Guild v. Chicago, 82 Ill. 472; Armstrong v. Traylor, 87 Tex. 598; 30 S. W. 440; Hamilton v. Carroll, 82 Md. 326, 33 Atl. 648; Bradshaw v. Lankford, 73 Md. 428, 21 Atl. 66.

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to be governed, in this respect, by the existing laws. In some few cases such laws have been ruled unconstitutional, on the ground that they delegated the power of the legislature. But the very great preponderance of authority is to the effect that such a statute, if it is a complete enactment in itself, requiring nothing further to give it validity, and depending upon the popular vote for nothing but a determination of the territorial limits of its operation, is a valid exercise of the legislative power.[115]

Conditional Legislation.

There is no provision in the American systems for a referendum on general subjects of legislative action, unless it may be in very rare and exceptional instances. The legislature is elected and authorized to make the laws. For that purpose the legislative power of the people is confided to them. That power cannot regularly be resumed and exercised by the people themselves. Neither can it be referred back to the people by the legislature in any particular instance. Delegation of legislative power to the people at large, from whom it was derived, is just as much against the spirit of the constitution as a delegation of it to one citizen. Nor can the legislature be allowed to shirk the responsibility of deciding upon the laws which should be made.[116] For these reasons it is held that the law-making body has no power, in enacting a general law, applicable to all the people of the state, to make its taking effect conditional upon the casting of a popular vote in its favor. For instance, the legislature, in enacting a law granting the right of suffrage to women, has no constitutional power to provide that the act shall take effect throughout the state on its acceptance by a majority vote of the electors.[117] But a general law may be made to depend upon some

[115] Weil v. Calhoun, 25 Fed. 865; State v. Court of Common Pleas, 36 N. J. Law, 72; State v. Pond, 93 Mo. 606, 6 S. W. 469; Locke's Appeal, 72 Pa. St. 491; Com. v. Dean, 110 Mass. 357; Village of Gloversville v. Howell, 70 N. Y. 287; Anderson v. Com., 13 Bush, 485; Gordon v. State, 46 Ohio St. 607, 23 N. E. 63.

[116] The government of each of our states is that of a representative republic, not a simple democracy. The power to make laws has been surrendered by the people to the legislature; and this power, thus conferred on the legislature, cannot be delegated by the legislature back to the people of the state or to any portion of the people. Ex parte Wall, 48 Cal. 279.

[117] Opinions of the Justices (In re Municipal Suffrage) 160 Mass. 586, 36 N. E. 488.

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contingency (other than ratification by popular vote) as to when it shall take effect in a particular locality,[118] or made dependent upon a future contingency as to whether it shall take effect at all,[119] even though that contingency be some action on the part of the legislature of another state; as, in the case of a "reciprocity" clause relating to the conditions on which foreign corporations shall be admitted to do business in the state.[120]

ENACTMENT OF LAWS.

144. State constitutions commonly include provisions regulating the enactment of laws by the legislature, as follows:

(a) No law can be passed except by bill.

(b) Bills for raising revenue must originate in the lower house.

(c) Every bill, before it becomes a law, must be read a certain number of times in each house.

(d) Every bill must be passed by a vote of the necessary majority in both houses.

(e) In some cases the final vote on a bill shall be taken by yeas and nays.

(f) After the bill is passed, it must be signed by the presiding officers of the two houses.

145. These constitutional requirements are generally to be deemed mandatory, and not merely directory; and the neglect or disregard of them will be fatal to the validity of any particular statute.

Introduction of Bills.

In parliamentary language, a "bill" is a written draft of a proposed act of legislation, introduced by a member of the legislative body. Any member has ordinarily the right to introduce any bill in the house to which he belongs. The usual practice is to refer the bill to a committee of the house, for its consideration, with

[118] People v. Hoffman, 116 Ill. 587, 5 N. E. 596, and 8 N. E. 768.

[119] Schulherr v. Bordeaux, 64 Miss. 59, 8 South. 201.

[120] Phœnix Ins. Co. v. Welch, 29 Kan. 672.

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directions to report thereon, after which the bill comes before the house for its consideration; and in several of the states this course is made imperative by constitutional provision.

As a general rule, bills of any kind may originate in either house of a state legislature, and may be amended, accepted, or rejected by the other. The principal exception to this rule is in the case of measures for raising revenue, which, by the constitutions of most of the states, are required to be first introduced in the lower or more numerous branch of the legislature. But such a constitutional provision applies only to bills to levy taxes, in the strict sense of the word, and not to bills for other purposes which may incidentally raise revenue.[121] The same restriction applies to congress; but it is held that an act increasing the rate of postage on certain mail matter is not unconstitutional because it originates in the senate. A bill establishing rates of postage is not a bill for raising revenue, although revenue may result from it.[122]

Reading of Bills.

The constitutions of many of the states require that a bill, before it shall become a law, shall be read a certain number of times (usually two or three) in each house. In respect to the manner of such reading, the provision is considered merely directory; but not so with regard to the fact of its being read. If the constitution is not obeyed in this latter particular, the statute is void.[123] And the legislature cannot evade the mandatory provisions of the constitution as to the enactment of laws by entitling the bill a "joint resolution" and passing it as such.[124] Where the requirement is that the bill shall be read three times, it is the usual practice of legislative bodies to have it read twice by title merely and once at full length; and this is considered sufficient to make its enactment lawful, unless the constitutional provision is so expressed as to make it imperative that each reading should be of the entire contents of the bill.[125] The reading of a bill at length in committee of the whole,

[121] Day Land & Cattle Co. v. State, 68 Tex. 526, 4 S. W. 865.

[122] U. S. v. James, 13 Blatchf. 207, Fed. Cas. No. 15,464.

[123] Board of Sup'rs of Ramsey Co. v. Heenan, 2 Minn. 330 (Gil. 281).

[124] Burritt v. Commissioners, 120 Ill. 322, 11 N. E. 180.

[125] People v. McElroy, 72 Mich. 446, 40 N. W. 750; Weill v. Kenfield, 54 Cal. 111.

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together with the reporting and recording upon the journal of the fact of such reading, may be treated as one reading of the bill.[126] And the fact that certain amendments suggested by a conference committee, and agreed to by both houses, were not read three times, and on three several days, in each house, will not render the act invalid.[127] In a considerable number of the states, the constitution provides that the three readings of a bill may be dispensed with in case of "urgency" by a vote of two-thirds or three-fourths of the members of the house where the bill is pending. When such an occasion arises, it is for the house alone to determine whether there is such "urgency" as to justify the passage of the bill without reading or with less than the usual number of readings. This is a question which will not be inquired into by the courts.[128] Where the constitution permits the reading of a bill by title only under suspension of the rules, and it appears that a bill was read by title and passed, and the journals are silent as to any suspension of the rules, it will be presumed, in order to sustain the act, that the rules were suspended.[129]

Passage by Majority Vote.

In order that the bill should become a law, it is next requisite that it should be passed by a vote of the necessary majority in the two houses. In some special cases a majority of two-thirds or even three-fourths is prescribed. But ordinarily a simple majority is enough. If the constitution provides for a vote by a majority "of the members" or "of the whole representation," this is imperative. But if the requirement is simply that there shall be a majority, it is understood that a majority of those present and voting (provided they constitute a quorum) will be sufficient. But whatever the constitutional requirement may be, it is absolutely necessary that the bill should receive the concurrent votes of a sufficient number of the members of each house to enact it into a law. If this is not the case, it never becomes a statute of the state, and the courts are not bound to regard or obey it.[130] Moreover, the same act must be passed

[126] In re Reading of Bills, 9 Colo. 641, 21 Pac. 477.

[127] State v. Brown, 33 S. C. 151, 11 S. E. 641.

[128] Weyand v. Stover, 35 Kan. 545, 11 Pac. 355; Hull v. Miller, 4 Neb. 503.

[129] Chicot Co. v. Davies, 40 Ark. 200.

[130] Amoskeag Bank v. Ottawa, 105 U. S. 667; Osburn v. Staley, 5 W. Va. 85; People v. Starne, 35 Ill. 121.

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by both houses in the same identical form, and in that form it must be submitted to the governor, in order to become a law.[181]

Yeas and Nays.

Some of the state constitutions provide that on the final passage of every bill the vote shall be taken by the yeas and nays. The "final passage" of a bill is the vote on its passage, in either house of the legislature, after it has received three readings on three different days in that house.[182] This constitutional requirement means that the roll of the house shall be called, and each member present and answering to his name shall vote "yea" or "nay," on the question of the passage of the bill, and the names of the members so voting on each side of the question shall be entered at large upon the journal. This provision is intended both to fix upon each member of the legislature the responsibility for his action in regard to the passage of every legislative measure, and also to secure an authoritative record of the passage of the bill by the requisite majority. Such a provision is mandatory. The legislature has no power to dispense with it. If an act does not appear from the journals to have been passed in this manner, where the constitution requires it, it is no law.[183] But if there is no provision in the constitution as to this manner of taking the vote (or in all cases where the constitutional requirement does not apply), it is in the discretion of either house to decide, by rule, when the yeas and nays shall be taken, or in what cases a member, or a number of members, shall have the right to call for the yeas and nays.[184] A constitutional provision that the names of members voting on the two sides of the question shall be entered on the journals is no less imperative than that which requires the taking of the yeas and nays. In a case where the journal recited the names of those members who were present, and stated that they voted unanimously in favor of the bill, but did not recite the names of those voting, it was held that there was no compliance with the requirement.[185]

181 State v. Van Duyn, 24 Neb. 586, 39 N. W. 612.
182 State v. Buckley, 54 Ala. 599.
183 Spangler v. Jacoby, 14 Ill. 297.
184 Lincoln v. Haugan, 45 Minn. 451, 48 N. W. 196
185 Steckert v. East Saginaw, 22 Mich. 104.

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Signature by Presiding Officers.

When a bill has been duly passed by the requisite majority, it is engrossed, and thereupon, by the constitutions of many of the states, it must be signed by the presiding officers of the two houses. This is the proper and constitutional mode of authenticating the act, and it cannot be dispensed with.[136] In regard to acts of congress, it is said: "Although the constitution does not expressly require bills that have passed congress to be attested by the signatures of the presiding officers of the two houses, the orderly conduct of legislative proceedings, and the rules under which the two bodies have acted since the organization of the government, require that mode of authentication."[137]

TITLE AND SUBJECT-MATTER OF STATUTES.

146. In most of the states, the constitution provides that no act of the legislature shall embrace more than one subject, and that such subject shall be expressed in the title of the act.

147. This provision is mandatory, and if it is disregarded, the whole statute, or any separable part of it not embraced within the title, will be rejected as unconstitutional

148. But this requirement is construed liberally, and the courts are unwilling to defeat or embarrass legislation by putting too strained or technical a construction upon this clause of the constitution.

In regard to the degree of particularity required in the title of a statute, it is the accepted doctrine that it is sufficient if the title describes, with adequate clearness, the general purpose and scope of the act. "It is only necessary that the title express the subject of the act, and not the provisions of the act or the details by which

[136] State v. Robinson, 81 N. C. 409; Pacific R. Co. v. Governor, 23 Mo. 364; State v. Kiesewetter, 45 Ohio St. 254, 263, 12 N. E. 807. But compare Commissioners of Leavenworth Co. v. Higginbotham, 17 Kan. 62.

[137] Field v. Clark, 143 U. S. 649, 12 Sup. Ct. 495.

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the object of the act is to be accomplished." [138] "It is sufficient if the title is comprehensive enough to reasonably include, as falling within the general subject, and as subordinate branches thereof, the several objects which the statute assumes to affect." [139] The title need not be an index of the contents of the act. "But, on the other hand, it should not mislead or tend to avert inquiry into the contents." [140] For example, a law incorporating a city, or one granting franchises to a business corporation, or one relating to the general subject of elections, or one regulating the manufacture and sale of intoxicating liquors, or one providing a general system of taxation for the state, will contain a great number of detailed and specific provisions. But if they all relate to the general subject-matter of the act, and are all germane to its general purpose, it is not necessary that each should be mentioned in the title. In all such cases, a general and comprehensive title will meet the requirement of the constitution.[141] Although all the subjects touched upon by the act are not enumerated in the title, it is not invalid if they all have congruity or a proper connection with the general subject of the act as described in the title.[142] And "the connection or relationship of several matters, such as will render them germane to one subject and to each other, can be of various kinds, as, for example, of means to ends, of different subdivisions of the same subject, or that all are designed for the same purpose, or that both are designated by the same term. Neither is it necessary that the connection or relationship should be logical; it is enough that the matters are connected with and related to a single subject in popular signification. The generality of the title of

[138] People v. Lawrence, 41 N. Y. 139.

[139] Donnersberger v. Prendergast, 128 Ill. 229, 21 N. E. 1.

[140] Allegheny County Home's Case, 77 Pa. St. 77; Montgomery Mut. Bldg. & Loan Ass'n v. Robinson, 69 Ala. 413.

[141] An act "more effectually to prevent the offenses of grand larceny, arson, and burglary" does not violate a constitutional provision that each law shall embrace but one subject; for the subject of this act is "the more effectual prevention," etc., and not the three crimes named. Miles v. State, 40 Ala. 39. An act "concerning bridges in Barber county" may properly include a provision authorizing the commissioners of that county to purchase bridges belonging to private corporations. Pierce v. Smith (Kan.) 29 Pac. 565.

[142] De Witt v. City of San Francisco, 2 Cal. 289.

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an act is no objection, provided only it is sufficient to give notice of the general subject of the proposed legislation and of the interests likely to be affected. The title was never intended to be an index of the law."[143] But though the title and the law may both refer to the same general subject-matter, yet if the title uses a term which describes a totally different branch of the subject from that dealt with in the body of the act, or an entirely different method of dealing with it, the act is void for this reason. For example, to entitle an act "to regulate the traffic in intoxicating liquors," and then, in the body of the act, entirely to prohibit such traffic, is not complying with the constitutional requirement.[144] But the title may be broader than the act without avoiding it; and it is no valid objection if the title makes reference to matters which would be inconsistent with its general scope, provided no such inconsistent matters are found in the statute itself.[145]

The addition of the word "etc." or the sign "&c." to the title of an act does not enlarge its scope, or bring within the title matters not more specifically described therein; under the constitutional provision in question, these letters have no meaning.[146] And the clause, "and for other purposes," when used in the title of an act, following a specific statement of the purposes of the act, is without any legal meaning, and does not enlarge the title so as to make it embrace anything not specifically expressed.[147]

But the courts, in dealing with a question of this kind, will not be solicitous to overthrow the statute. On the contrary, they will give the legislature the benefit of every doubt, and will endeavor to so read the title and the act as to make the one adequate to express the subject of the other. "It has always been held that these statutory titles, in regard to their construction, are to be liberally treated, so as to validate the law to which they appertain, if such course be reasonably practicable. In such a connection, hyper-

[143] Johnson v. Harrison, 47 Minn. 575, 50 N. W. 923.

[144] In re Hauck, 70 Mich. 396, 38 N. W. 269.

[145] Powers v. McKenzie, 90 Tenn. 167, 16 S. W. 559.

[146] State v. Hackett, 5 La. Ann. 91.

[147] Board of Commissioners of Pitkin County v. Aspen Mining & Smelting Co., 3 Colo. App. 223, 32 Pac. 717.

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criticism is utterly out of place, the only requirement being that the title of the statute shall express its object in a general way, so as to be intelligible to the ordinary reader."[148]

A statute perfect in itself may repeal another law or part of a law by implication, although such repeal is not expressed in the title of the repealing statute.[149] For example, where an act is entitled "An act to restore uniformity in taxation," the repeal of certain special laws which interfere with uniformity of taxation is germane to the subject and may properly be embraced in such act.[150]

Even where two or more subjects are embraced in the act or expressed in the title, it does not always follow that the statute will be void in toto. Where the act is broader than its title, the portion in excess of the title will be declared void, if this can be done without destroying the rest of the enactment; as, where the title of the act relates to "all citizens" and the body of the act to "all persons." In such a case, in order to entitle a party to the benefit of the act, it must be alleged and proved that he is a citizen.[151] If the act embraces distinct subjects which are not expressed in the title, and also subjects which are expressed in the title, it is void as to the former, but not necessarily void as to the latter. It is then subject to the rule that an act unconstitutional in part will not be declared void in toto if the valid portions "are separable from the void provisions and capable of enforcement independently of such void provisions, unless it shall appear that all of the provisions of the act are so dependent on each other, operating together for the same purpose, or are otherwise so connected together in meaning, that it cannot be presumed that the legislature would have passed the one without the other provision."[152] And where the title embraces two objects, and the act embraces two

[148] In re Haynes, 54 N. J. Law, 6, 22 Atl. 923; Johnson v. Harrison, 47 Minn. 575, 50 N. W. 923; Allegheny County Home's Case, 77 Pa. St. 77.

[149] Union Trust Co. v. Trumbull, 137 Ill. 146, 27 N. E. 24.

[150] Burke v. Monroe Co., 77 Ill. 610.

[151] Messenger v. State, 25 Neb. 674, 41 N. W. 638.

[152] Donnersberger v. Prendergast, 128 Ill. 229, 21 N. E. 1; People v. Briggs, 50 N. Y. 553.

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subjects, so that it is impossible to tell which object was intended by the legislature, the courts are not at liberty to select one object and sustain the law as to that alone; the whole act must fall.[158]

[158] Skinner v. Wilhelm, 68 Mich. 568, 30 N. W. 811; City of San Antonio v. Gould, 84 Tex. 49.

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CHAPTER XIV.

THE POLICE POWER.

149. Definition and General Considerations.
150. Police Power Inalienable.
151. Scope of the Power.
152. Location of the Police Power.
153. Police Power Vested in Congress.
154. Police Power of the States.
155. Limitations of the Police Power.

DEFINITION AND GENERAL CONSIDERATIONS.

149. There is in every sovereignty an inherent and plenary power to make all such laws as may be necessary and proper to preserve the public security, order, health, morality, and justice. This power is called the "police power." It is a fundamental power and essential to government, and is based upon the law of overruling necessity.

Definition.

In its most general sense, "police" is the function of that branch of the administrative machinery of government which is charged with the preservation of public order and tranquillity, the promotion of the public safety, health, and morals, and the prevention, detection, and punishment of crimes. And the police power is the power vested in a state to establish laws and ordinances for the regulation and enforcement of its police, as just defined. It has been remarked by the supreme court of the United States that while many attempts have been made to define the police power, the endeavor has never met with entire success. "It is always easier to determine whether a particular case comes within the general scope of the power than to give an abstract definition of the power itself which will be in all respects accurate." [1]

[1] Stone v. Mississippi, 101 U. S. 814, 818. "The police power of a state is co-extensive with self-protection, and is not inaptly termed 'the law of

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Nature and Origin of Power.

It cannot be doubted that the origin of this power must be sought in the very purpose and framework of organized society. It is fundamental and essential to government. It is a necessary and inherent attribute of sovereignty. It antedates all laws, and may be described as the assumption on which constitutions rest. For the state (whether we regard it as an association of individuals or as a moral organism) must have the right of self-protection and the right to preserve its own existence in safety and prosperity, else it could neither fulfill the law of its being nor discharge its duties to the individual. And to this end, it is necessarily invested with power to enact such measures as are adapted to secure its own authority and peace, and to preserve its constituent members in safety, health, and morality. Theories of the state, according as they tend to enlarge or restrict the legitimate sphere of its functions and activities, will create theories as to the proper limitations of the police power. But its existence, in a measure proportioned to the rights and duties it is to guard, is implied in the recognition of the state as a factor in law and civilization. "It is a power," as has been well said, "essential to self-preservation, and exists, necessarily, in every organized community. It is, indeed, the law of nature, and is possessed by man in his individual capacity."[2] For these reasons it appears that the nature and authority of the police power are best described by the maxim "salus populi suprema lex," while the principle, "sic utere tuo ut alienum non laedas," furnishes, in most cases, a convenient rule for its application.[3]

Police Power Distinguished from Eminent Domain.

There is a broad distinction between the taking of private property for a public use, under the power of eminent domain, and the incidental injury or inconvenience, or damage or deterioration, which may result to property or business on account of the exertion of

overruling necessity.' It is that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort and welfare of society." Lake View v. Rose Hill Cemetery, 70 Ill. 191. "The police power of a state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state." Thorpe v. Rutland & B. R. Co., 27 Vt. 140.

[2] License Cases, 5 How. 588. [3] See Wynehamer v. People, 13 N. Y. 378.

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the police power of the state, when its purpose is the promotion of the public welfare. In the former case, compensation must be made to the owner; in the latter case, no such obligation arises. All rights of property are subject to the paramount authority of the state to prohibit any use which may be deemed detrimental to the public safety, health, or morals. "Nor does the prohibition of such noxious use of property, a prohibition imposed because such use would be injurious to the public, although it may diminish the profits of the owner, make it an appropriation to a public use, so far as to entitle the owner to compensation. If the owner of a vacant lot in the midst of a city could erect thereon a great wooden building and cover it with shingles, he might obtain a larger profit of his land than if obliged to build of stone or brick with a slated roof. If the owner of a warehouse in a cluster of other buildings could store quantities of gunpowder in it for himself and others, he might be spared the great expense of transportation. If a landlord could let his building for a smallpox hospital, or a slaughter house, he might obtain an increased rent. But he is restrained; not because the public have occasion to make the like use, or to make any use, of the property, or to take any benefit or profit to themselves from it, but because it would be a noxious use, contrary to the maxim, sic utere tuo ut alienum non laedas. It is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner, and is therefore not within the principle of property taken under the power of eminent domain. The distinction, we think, is manifest in principle, although the facts and circumstances of different cases are so various that it is often difficult to decide whether a particular exercise of legislation is properly attributable to the one or the other of these acknowledged powers." [4]

[4] Com. v. Alger, 7 Cush. 53, 86. See, also, Moore v. City of Indianapolis, 120 Ind. 483, 22 N. E. 424; Fertilizing Co. v. Hyde Park, 97 U. S. 659; Beer Co. v. Massachusetts, Id. 25; Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273; Bancroft v. City of Cambridge, 126 Mass. 438. Compare Wynehamer v. People, 13 N. Y. 378, with the foregoing cases, and particularly with Mugler v. Kansas.

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POLICE POWER INALIENABLE.

150. The police power cannot be surrendered by the legislature or irrevocably alienated in favor of individuals or corporations.

In several instances, police regulations have been assailed, in respect to their validity, on the ground that they were repugnant to that clause of the federal constitution which prohibits the states from passing laws impairing the obligation of contracts. But it has always been held that the police power is an inalienable attribute of sovereignty, and therefore can never be curtailed or diminished; that it is present, by implication, in every act of legislation; and that no legislature can either surrender or sell it, or destroy or hamper the power of its successors to make such enactments as they may deem proper in matters of public police. From this it follows that if an irrevocable grant of franchises or any contract made by the legislature with an individual or a corporation specifies or implies a relinquishment of the police power of the state, it is to that extent invalid, the legislature having exceeded the authority delegated to it by the people. In other words, the exercise by the state, at any time, of its right to legislate for the protection and good government of the community can never be construed into a violation of the prohibition in question, notwithstanding its effect may be to repeal existing charters, or otherwise invade the terms of legislative engagements.[8]

SCOPE OF THE POWER.

151. The "police power," as the term is used in constitutional law, does not embrace the general field of legislation, but is restricted to matters which are properly of police regulation.

There is a certain broad and general sense in which the scope of the police power may be made to include all legislation and to em-

[8] Stone v. Mississippi, 101 U. S. 814; Boyd v. Alabama, 94 U. S. 645; Butchers' Union Slaughterhouse Co. v. Crescent City Live-Stock Landing Co., 111 U. S. 746, 4 Sup. Ct. 652; Kresser v. Lyman, 74 Fed. 765.

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brace almost every function of civil government. In this signification, the authority of the state to create educational and charitable institutions, to provide for the establishment and control of public highways, turnpikes, canals, wharves, ferries, and telegraph lines, to direct the reclamation of swamp lands, etc., may be referred to the power in question. But there is also a more particular and restricted sense, in which the term is almost always used when it enters into the discussion of constitutional questions. And in this meaning its scope is limited to the making of laws which are necessary for the preservation of the state itself, and to secure the uninterrupted discharge of its legitimate functions, for the prevention and punishment of crime, for the preservation of the public peace and order, for the preservation and promotion of the public safety, the public morals, and the public health, and for the protection of all the citizens of the state in the enjoyment of their just rights against fraud and oppression.[6] Some laws are clearly within that scope. Others are more doubtful. But in the latter case, if the act in question is not open to objection on the ground of infringing some positive constitutional prohibition, its validity is sufficiently established without justifying it as a manifestation of the police power in action. And it is much better not to stretch the term to its widest limits. For the police power, properly so called, is so far-reaching in its importance and so paramount in its sway, even as against guarantied private rights, that its enlargement, by continual loose applications of the term to cases where it is neither needed nor appropriate, is dangerous to the safeguards of freedom.

LOCATION OF THE POLICE POWER.

152. Under the American system of government, the power and authority to make police regulations is vested—

(a) In the legislatures of the several states, to a plenary degree, subject only to the paramount authority of positive constitutional prohibitions.

[6] See New Orleans Gaslight Co. v. Louisiana Light, etc., Co., 115 U. S. 650, 6 Sup. Ct. 252. And see Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. 499; People v. Jackson & M. Plank-Road Co., 9 Mich. 307.

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(b) In congress, to a limited extent and for special purposes.

(c) In the authorities of municipal corporations, in a subordinate and delegated manner.

It must be observed that there is not a distinct police power inherent in municipal corporations, other than that of the state to which they owe their existence. In incorporating a municipality, the state delegates to it the power to make police regulations so far as may concern its own citizens, its own affairs, and its own territorial jurisdiction. This is in accordance with the principle of local self-government. Ordinances made in pursuance of this power must be tested as other municipal ordinances are. They must not contravene any constitutional provision, nor exceed the charter powers of the municipality, nor be unreasonable. The state may also make police regulations applicable to all its municipal corporations of a certain grade or class, or for particular cities, unless restrained by the constitution. And of course the police power delegated to a municipal corporation is not exclusive of that retained by the state. That is, municipal police regulations must yield to the general laws of the state, enacted under the same power, whenever there is a conflict between them.

POLICE POWER VESTED IN CONGRESS.

153. Within the scope of its supreme authority, and in the exercise of its expressly granted powers, congress has the right to enact measures relating to the public police of the nation.

The statement is frequently made that congress is not invested with the police power. It is true that congress has no general power to make police regulations for the people of the United States, nor has it authority to interfere, in matters not committed to its exclusive jurisdiction, with the internal affairs of the states, under the pretense of police regulations. The protection of the public safety, health, and morals is in general left to the care of the individual states. For example, when congress passed an act prohibiting the sale of certain kinds of oil, or of oil unable to undergo a fire test, it

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was adjudged that this act was plainly a police regulation, relating exclusively to the internal trade of the states, and therefore beyond the rightful power of congress, and it could be operative only within the District of Columbia.[7] But within its appointed sphere, congress possesses paramount authority. In the highest sense it is vested with the power of police, since it possesses the power to legislate for the preservation of national existence, the protection of national integrity, and the supremacy of national law. The police power being primarily a right of self-defense, as applied to organized civil society, it must belong of right to every independent government, including that of the United States. Thus it is within the necessary power of the federal government to protect its own existence and the unhindered play of its legitimate activities. And to this end, it may provide for the punishment of treason, the suppression of insurrection or rebellion, and for the putting down of all individual or concerted attempts to obstruct or interfere with the discharge of the proper business of the government or those operations of commerce over which it has exclusive jurisdiction. So also in the important case of Re Neagle,[8] the doctrine was laid down that there is "a peace of the United States," which it is the right and duty of federal officers to defend and preserve. And it belongs to the United States, as a sovereign and independent nation, to determine what classes or races of foreigners shall be admitted to settle within its limits, and who shall be forbidden, and also to expel or deport those unnaturalized aliens whose presence may be deemed detrimental to the general welfare. It is on this principle that the Chinese exclusion acts are sustained.[9]

[7] U. S. v. Dewitt, 9 Wall. 41.

[8] 135 U. S. 1, 10 Sup. Ct. 658. So, also, in Ex parte Siebold, 100 U. S. 371, Mr. Justice Bradley said: "We hold it to be an incontrovertible principle that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent."

[9] See Nishimura Ekiu v. U. S., 142 U. S. 651, 659, 12 Sup. Ct. 336; Chae Chan Ping v. U. S., 130 U. S. 581, 9 Sup. Ct. 623; Fong Yue Ting v. U. S., 149 U. S. 698, 13 Sup. Ct. 1016.

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Again, the constitution confers upon congress power to levy taxes to provide for the common defense and general welfare of the United States; to establish a uniform rule of naturalization; to provide a punishment for counterfeiting the securities or coin of the United States; to define and punish piracies and felonies committed on the high seas and offenses against the law of nations; to provide for calling out the militia; to raise and support armies and navies; and to declare the punishment of treason. Laws have been passed in execution of every one of these powers. And every one of such laws is strictly and properly speaking an exercise of the police power. Furthermore, congress, under the constitution, possesses exclusive jurisdiction over certain subjects. And in its legislation upon these subjects, an act is not to be declared invalid merely because it has a purpose and design which ranks it as a police regulation. For instance, congress has no authority to legislate directly for the suppression of lotteries. But having exclusive control over the postal system, it has the power to prohibit the use of the mails for the transmission of lottery advertisements.[10] So again, congress possesses the exclusive power to regulate foreign and interstate commerce. And in the exercise of this power it has passed laws to protect such trade and commerce against unlawful restraints and monopolies and against trusts and illegal combinations.[11] To the same category belong the acts of congress prohibiting the importation of adulterated articles of food or drink,[12] and the laws regulating immigration, and prohibiting the entry of insane persons, paupers, persons suffering from contagious diseases, convicts, polygamists, assisted immigrants, and alien laborers brought in under contract for their labor.[13] Here also should be classed the statute forbidding the importation of opium by the Chinese, and the national quarantine law.[14] In the exercise of its power to regulate commerce with the Indian tribes, congress may prohibit the sale of liquor to an Indian under the charge of an

[10] In re Rapier, 143 U. S. 110, 12 Sup. Ct. 374.

[11] See U. S. v. Patterson, 55 Fed. 605.

[12] Act Aug. 30, 1890.

[13] See U. S. v. Craig, 28 Fed. 795; Church of Holy Trinity v. U. S., 143 U. S. 457, 12 Sup. Ct. 511; Head Money Cases, 112 U. S. 580, 5 Sup. Ct. 247.

[14] The former of these is the act of February 23, 1887, and the latter the act of February 15, 1893.

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agent anywhere within the United States.[15] And under the taxing power, and in connection with the internal revenue system, it has enacted a law "defining butter and imposing a tax upon, and regulating the manufacture, sale, importation, and exportation of oleomargarine."[16] The character of these various statutes, as police regulations, will be more clearly seen by comparison with the examples of the exercise of the same power by the states, now to be mentioned.

POLICE POWER OF THE STATES.

154. Subject to the authority of congress, within the sphere of its rightful powers, and subject to any restrictions imposed by the constitution, the legislature of each state possesses full power to enact police regulations on matters relating to—

(a) The preservation of the state itself and the unhindered execution of its legitimate functions.
(b) The prevention and punishment of crime.
(c) The preservation of the public peace and order.
(d) The preservation of the public safety.
(e) The purity and preservation of the public morals.
(f) The protection and promotion of the public health.
(g) The regulation of business, trades, or professions, the conduct of which may affect one or other of the objects just enumerated.
(h) The regulation of property and rights of property, so far as to prevent its being used in a manner dangerous or detrimental to others.
(i) The prevention of fraud, extortion, and oppression.
(j) Roads and streets, and their preservation and repair.
(k) The preservation of game and fish.

[15] U. S. v. Holliday, 3 Wall. 407.
[16] See U. S. v. Eaton, 144 U. S. 677, 12 Sup. Ct. 764.

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The Public Safety.

One of the prime objects for which the police power of the state may be exercised, if not the most important of all, is the preservation of the public safety. And in pursuance of this object, laws are passed by all the states, the constitutionality of which is never so much as brought in question. These are statutes for the prevention, detection, and punishment of crime, laws creating courts and their officers, regulating criminal procedure, providing for policemen, sheriffs, jails, and penitentiaries, in fact, establishing and directing the whole machinery of criminal justice. This branch of the power in question also includes the right of the state to confine convicted criminals in its prisons and subject them to proper prison discipline; also the right to require the confinement of dangerous lunatics and maniacs, and possibly of habitual drunkards, after due investigation and hearing; also the power to exercise police supervision over vagrants, tramps, and beggars, and the power to exercise control and supervision over habitual criminals, well known offenders, and suspicious characters.[17] Again, there is included in this power "the pulling down houses and raising bulwarks for the defense of the state against an enemy; seizing corn and other provisions for the sustenance of an army in time of war, or taking cotton bags, as General Jackson did at Orleans, to build ramparts against an invading foe."[18] Another illustration of police regulations for the benefit of the public safety is to be seen in laws authorizing the destruction of houses in a city, to prevent the spread of a conflagration. When the best or only available means of controlling a fire is to destroy buildings which stand in its path, and which would be burned if left standing, this may be done under proper authority; and the owners cannot complain that their property is taken without due process of law, although no compensation is provided for them.[19] Other examples of the operation of the police power for the same end are the laws limiting the number of passengers which steamboats may carry, providing for the in-

[17] Morgan v. Nolte, 37 Ohio St. 23.

[18] Parham v. Justices of Inferior Court, 9 Ga. 341.

[19] Surocco v. Geary, 3 Cal. 69; Taylor v. Plymouth, 8 Metc. (Mass.) 462; Stone v. Mayor, etc., of City of New York, 25 Wend. 157; Russell v. Mayor of New York, 2 Denio, 461.

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spection of their boilers, and requiring them to provide life-preservers; laws or ordinances requiring dangerous machinery to be so guarded as to prevent injuries and accidents; laws establishing fire limits in cities, within which wooden buildings may not be erected; laws prohibiting the keeping of gunpowder in unsafe quantities in cities and villages; laws taxing dogs, requiring their registration, or requiring them to wear a collar or muzzle, and authorizing their destruction if found running at large in violation of the law.[20] In this class of enactments must also be included laws or ordinances prohibiting the use of bicycles on certain roads unless permitted by the superintendent of such roads,[21] laws providing that all oils and fluids used for illuminating purposes shall be inspected by an authorized state officer before being sold or offered for sale,[22] laws forbidding the carrying of concealed deadly weapons, and laws prohibiting or regulating processions or parades of armed bodies of men not belonging to the military forces of the state or of the United States.[23] To the same category belong the building laws in many of our cities and states. These often go into great minuteness of detail, and furnish an illustration of the closeness with which public authorities may scrutinize private operations in the interest of the public safety and health. Such laws may regulate the height of buildings, or prescribe a maximum height, either absolutely or in proportion to the width of the street. And they may also regulate all such matters as the thickness and strength of the walls, drainage and sewer connections, character of the plumbing, proper disposition of appliances for heating and lighting, elevators, skylights, fire-escapes, the number and character of exits in theaters and public halls, signs on shops, piazzas and balconies, etc.[24] On the same principle, it is competent for the proper authorities to require that all electric wires, in populous cities, shall be laid under the surface of the streets.[25] Finally, we may mention the statutes, in force in some of the states, which require that all bottles or

[20] Cranston v. Mayor, etc., of Augusta, 61 Ga. 572.
[21] State v. Yopp, 97 N. C. 477, 2 S. E. 458.
[22] Patterson v. Kentucky, 97 U. S. 501.
[23] Dunne v. People, 94 Ill. 120.
[24] People v. D'Oench, 111 N. Y. 359, 18 N. E. 862.
[25] American Rapid Tel. Co. v. Hess, 125 N. Y. 641, 26 N. E. 919.

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packages sold by druggists and containing poison shall be plainly marked with the word "Poison," and those which require pharmacists to keep a record of all poisons sold by them, with the names of the purchasers. Laws of all the foregoing varieties have been sustained by the courts as valid and constitutional, whenever they have been called in question, on the ground that they are police regulations for the preservation of the public safety, notwithstanding the effect they may have on private rights or private property.

The Public Morals.

Many statutes have been enacted in the various states for the promotion and preservation of public morality. And they have almost without exception been sustained by the courts as valid police regulations. Among these should be mentioned the laws defining and punishing blasphemy; laws requiring the intermission of business and secular employments on Sunday; laws punishing offenses against decency; laws making it a misdemeanor to disturb a religious meeting; laws prohibiting or regulating the sale of intoxicating liquors; those designed for the extirpation of brothels; those which prohibit the publication, exhibition, or sale of obscene books or pictures; those prohibiting gaming or the keeping of gaming tables or other gambling devices; those aimed at the suppression of lotteries and gift-enterprises; those prohibiting polygamous or incestuous marriages;[26] and ordinances prohibiting the exhibition of stallions in public places.[27] To this class, also, we should probably refer the laws forbidding and punishing cruelty to animals. The best justification for these last-mentioned statutes, however, lies in the vital interest which the state has in the development of peaceable and law-abiding citizens, and in the repression, by every proper means, of those savage and vindictive passions which prompt men to the commission of crimes of violence.

The Public Health.

The preservation of the public health is one of the chief objects for which the police power may lawfully be exercised. Quarantine laws established by the states furnish an illustration of a highly important application of the power to this purpose. Such laws are

[26] Reynolds v. U. S., 98 U. S. 145.

[27] Nolan v. Mayor, etc., of Franklin, 4 Yerg. 168.

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within the police power of the states.[28] And in the further discharge of the state's duty to prevent the introduction and spread of epidemics, it is competent to provide public hospitals or lazarettos, in proper places, for the treatment of dangerous, infectious, or contagious diseases, and to require the removal to such hospitals of all persons found to be suffering from such diseases, even in cases where it is probable that the patient himself would be properly cared for by his friends.[29] The same is true of regulations requiring houses where there are cases of such diseases to display a conspicuous sign or warning, and laws authorizing an official inspection of dwelling houses, with reference to their sanitary condition, in times of epidemic or other great sickness.[30] And it is held that, vaccination being the most effective method known of preventing the spread of a deadly and highly contagious disease, it is competent for the legislature to enact that all children shall be vaccinated before being permitted to attend the public schools.[31] Other examples of statutes belonging to this class, and to be justified on this ground, are those intended to secure a wholesome and sufficient supply of pure water for cities, including the purchase or maintenance of water-works,[32] those requiring the clearing or draining of swampy or marshy lands which might otherwise breed disease, those regulating the sale of opium,[33] those authorizing the exclusion from the state, or the destruction, of animals affected with contagious diseases,[34] those requiring the laying of sewers in

[28] Gibbons v. Ogden, 9 Wheat. 203; Train v. Boston Disinfecting Co., 144 Mass. 523, 11 N. E. 929.

[29] Harrison v. Mayor, etc., of Baltimore, 1 Gill, 264; Brown v. Purdy, 54 N. Y. Super. Ct. 109.

[30] The exercise of summary power given to health officers to quarantine persons likely to spread contagion is not obnoxious to the requirement of "due process of law." In re Smith, 84 Hun, 465, 32 N. Y. Supp. 317.

[31] Abeel v. Clark, 84 Cal. 226, 24 Pac. 383; In re Walters, 84 Hun, 457, 32 N. Y. Supp. 322; Duffield v. School Dist., 162 Pa. St. 476, 29 Atl. 742; Bissell v. Davison, 65 Conn. 183, 32 Atl. 348.

[32] 1 Dill. Mun. Corp. § 146.

[33] Ex parte Yung Jon, 28 Fed. 308. It has even been held that a law making it a misdemeanor to smoke opium is a valid exercise of the police power. Ah Lim v. Territory, 1 Wash. St. 156, 24 Pac. 588.

[34] Railroad Co. v. Husen, 95 U. S. 465; Missouri Pac. Ry. Co. v. Finley, 38 Kan. 550, 16 Pac. 951; Newark & S. O. H. C. Ry. Co. v. Hunt, 50 N. J. Law, 308, 12 Atl. 697.

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cities, and obliging the owners of dwelling houses to make connection with them. Here also should be mentioned inspection laws, when designed to protect the public against the introduction of commodities unfit for use. A city ordinance declaring that the cultivation of rice within the corporate limits of the city is injurious to the public health, and providing for the removal and destruction of the growing crops of rice within the limits of the city, is also a valid police regulation.[35] So the state or a city may lawfully forbid the depositing of garbage or filth in any place, public or private, except such places as may be designated for that purpose by the superintendent of highways.[36] And a city may prohibit the keeping of swine within particular districts of the city.[37] And again, a law requiring all physicians and midwives to report to the clerk of the court, within thirty days after their occurrence, all births and deaths which may come under their supervision, is valid and constitutional.[38]

Purity of Food Products.

It is undoubtedly within the legitimate scope of the police power to prohibit the adulteration of articles intended for human food, and to impose penalties upon those who sell, or offer for sale, tainted, unwholesome, or adulterated food products. Where the adulteration consists in the addition of something dangerous or deleterious to health, the ground of state interference is very clear. When the added ingredient is harmless in itself, the sale of the adulterated compound may still be forbidden, on the ground of the fraud and deception practiced in its sale. The sale of provisions unfit for human use is indictable at common law.[39] For reasons partly connected with the public health, and partly with the prevention of fraud, it is held that laws prohibiting or regulating the manufacture and sale of oleomargarine are valid as an exercise of the police power.

[35] Green v. Mayor, etc., 6 Ga. 1.

[36] Ex parte Casinello, 62 Cal. 538.

[37] Com. v. Patch, 97 Mass. 221.

[38] Robinson v. Hamilton, 60 Iowa, 134, 14 N. W. 202. In order to connect a law of this kind with the police power, it is only necessary to reflect that modern sanitary science owes much to the system of registering and reporting dangerous diseases and the localization thereby of unsanitary conditions.

[39] See Swain v. Schieffelin, 134 N. Y. 471, 31 N. E. 1025.

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"Whether the manufacture of oleomargarine, or imitation butter, of the kind described in the statute, is or may be conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such a manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy which belong to the legislative department to determine." [40] So also, a statute or city ordinance prohibiting the adulteration of milk, providing for an analysis of milk by an authorized milk inspector, and prohibiting the feeding of cows on still slops and the vending of the milk of cows so fed, is valid as an exercise of the police power.[41] The same is true of a law requiring baking powder which contains alum to be marked so as to show that fact.[42] And an ordinance is valid which requires the filling up of wells on premises where bread is made, when its object is to prevent the use of unwholesome well water in the making of bread for public distribution and consumption.[43]

Intoxicating Liquors.

That the regulation of the manufacture and sale of intoxicating liquors is a proper subject for the exercise of the police power, is a proposition which has never been doubted. On all the grounds which are recognized as most safely and surely bringing a matter within the scope of this power, the production and selling of intoxicants is included within the sphere of its legitimate operations. Whatever form, therefore, the regulating or restricting law may assume, if it is not in contravention of some constitutional provision, it is to be sustained as valid on this ground. This has been the decision in regard to laws totally prohibiting the manufacture and sale of liquors, laws allowing such prohibition to particular parts of the state at their option, laws licensing the traffic in liquors, regulating

[40] Powell v. Pennsylvania, 127 U. S. 678, 8 Sup. Ct. 992, 1257. Compare People v. Marx, 99 N. Y. 377, 2 N. E. 29.

[41] Com. v. Waite, 11 Allen (Mass.) 264; Com. v. Carter, 132 Mass. 12; State v. Campbell, 64 N. H. 402, 13 Atl. 585; Johnson v. Simonton, 43 Cal. 242.

[42] Stolz v. Thompson, 44 Minn. 271, 46 N. W. 410.

[43] State v. Schlemmer, 42 La. Ann. 1166, 8 South. 307.

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or prohibiting the sale on certain days or in certain places, or to particular classes of persons, authorizing the search for and seizure of liquors illegally kept for sale, imposing special or punitive taxation upon the business, and laws giving a right of action in damages to persons injured as a consequence of particular sales against the persons making such sales.[44] One of the latest and most noteworthy attempts to regulate the traffic in such a manner as to minimize its evils was the South Carolina "Dispensary Law" of 1892. This statute prohibited the manufacture, sale, and traffic in all intoxicating liquors, except by the officers, and according to the system, which it created. In effect, it gave to the state itself a monopoly of the business of liquor selling, by providing that all liquor intended to be sold should be purchased by a state commissioner, under the direction of a state board of control, and by him retailed to the county dispensers (also state officers under the law), who were authorized to sell to individuals, under severe restrictions as to the kind and class of persons to whom such sales might be made. The profits of the business were to be for the use of the state, and a large sum of money was appropriated for the expense of inaugurating and maintaining the system. The question of the validity of this law first arose in the United States circuit court, and it was sustained, as against objections based on various clauses of the federal constitution.[45] But afterwards the supreme court of the state held it to be void, as conflicting with the constitutional right of citizens to liberty, freedom of occupation, and the pursuit of happiness. And it was said that the law was not a police regulation of the business of selling intoxicating liquors, because it did not prohibit the sale except by the citizens of the state, but encouraged such sale by providing that the profits thereof should

[44] See Beer Co. v. Massachusetts, 97 U. S. 25; Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273; Crowley v. Christensen, 137 U. S. 86, 11 Sup. Ct. 13; Fisher v. McGirr, 1 Gray, 1; Lincoln v. Smith, 27 Vt. 328; State v. Ludington, 33 Wis. 107; Fell v. State, 42 Md. 71; Sibila v. Bahney, 34 Ohio St. 399; Bertholf v. O'Reilly, 74 N. Y. 509; Kidd v. Pearson, 128 U. S. 1, 9 Sup. Ct. 6; Foster v. Kansas, 112 U. S. 201, 5 Sup. Ct. 8, 97; Bowman v. Chicago & N. W. Ry. Co., 125 U. S. 465, 8 Sup. Ct. 689, 1062; Com. v. Intoxicating Liquors, 115 Mass. 153; Trageser v. Gray, 73 Md. 250, 20 Atl. 905.

[45] Cantini v. Tillman, 54 Fed. 969.

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enure to the state, and because it gave the state a monopoly of the business, and the police power of the state does not extend to the regulation of a business conducted by itself.[46] At a later day, however, this decision was overruled; and the law is now sustained as valid and constitutional.[47]

Regulation of Railways.

Among the many police regulations adopted by states and cities, for the safety and comfort of the public in connection with the operation of steam railways, all of which have been held constitutional, may be mentioned the following: Laws regulating the speed of locomotives and trains in passing through cities and towns;[48] laws requiring railroad companies to light such portions of their road as lie within the limits of a city or town;[49] laws requiring such companies to build and maintain highway crossings laid out over their track,[50] or to build and maintain a bridge where the track crosses a turnpike road;[51] laws providing that, where two railroad tracks cross each other at grade, a watchman shall be maintained at the joint expense of the companies, and that all trains shall come to a full stop and wait for signal before crossing at the junction;[52] laws requiring locomotives to carry a bell of a certain weight and a steam whistle, and to ring the bell or blow the whistle five hundred yards before road crossings, and making the failure to give such signals negligence per se;[53] laws providing that, at all railroad crossings, the railroads crossing there shall erect and maintain suitable depots and waiting rooms to accommodate passengers;[54] laws requiring that, in the formation of mixed trains, the baggage and freight cars shall be placed in front of the pas-

[46] McCullough v. Brown, 41 S. C. 220, 19 S. E. 458. And see In re Langford, 57 Fed. 570.

[47] State v. City Council of Aiken, 42 S. C. 222, 20 S. E. 221.

[48] Mobile & O. R. Co. v. State, 51 Miss. 137; Merz v. Railway Co., 88 Mo. 672.

[49] Cincinnati, H. & D. R. Co. v. Sullivan, 32 Ohio St. 152.

[50] Portland & R. R. Co. v. Inhabitants of Deering, 78 Me. 61, 2 Atl. 670.

[51] People v. Boston & A. R. Co., 70 N. Y. 569.

[52] Lake Shore & M. S. Ry. Co. v. Cincinnati, S. & C. Ry. Co., 30 Ohio St. 604.

[53] Kaminitsky v. Railroad Co., 25 S. C. 53.

[54] State v. Kansas City, Ft. S. & G. R. Co., 32 Fed. 722; State v. Wabash, St. L. & P. Ry. Co., 83 Mo. 144.

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senger coaches;[55] laws forbidding railroad companies to heat their cars with stoves or furnaces kept inside the cars or suspended therefrom;[56] laws requiring them to provide spark-arresters for locomotives, to keep headlights of a certain reflective power on engines, and to keep on hand certain means of escape in case of collisions or fires; laws requiring them annually to publish their tariff of rates for the transportation of passengers and freight;[57] laws requiring that all railroad ticket offices shall be opened for the sale of tickets at least an hour before the departure of each train;[58] laws providing that all passenger trains shall stop at least five minutes at each station, unless it should plainly appear that the vested rights of the company were unduly prejudiced by such a regulation.[59] So, also, it is a competent exercise of the police power to provide, by general statute, that all railroads in the state shall fence their road on both sides and provide sufficient cattle guards at all farm and road crossings, under penalty of paying all damages for killing stock caused by their neglect to comply with such requirements, and even double damages.[60] But such statutes cannot go beyond the imposition of such a penalty in cases where the fault lies at the door of the company. If the law attempts to make such companies liable for accidents which were not caused by their negligence or disobedience to the law, but by the negligence of others or by uncontrollable causes, or does not give the company an opportunity to show these facts in its own defense, it is void.[61] The reasons why railroad companies

[55] Arkansas M. Ry. Co. v. Canman, 52 Ark. 517, 13 S. W. 280.

[56] People v. New York, N. H. & H. R. Co. (Sup.) 5 N. Y. Supp. 945.

[57] Railroad Co. v. Fuller, 17 Wall. 560.

[58] Brady v. State, 15 Lea (Tenn.) 628.

[59] Galveston, H. & S. A. R. Co. v. Le Gierse, 51 Tex. 189.

[60] Birmingham M. R. Co. v. Parsons, 100 Ala. 662, 13 South. 602; Missouri Pac. R. Co. v. Humes, 115 U. S. 512, 6 Sup. Ct. 110; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 9 Sup. Ct. 207.

[61] Zeigler v. Railroad Co., 58 Ala. 594; Ohio & M. R. Co. v. Lackey, 78 Ill 55; State v. Divine, 98 N. C. 778, 4 S. E. 477. Railroad companies cannot be compelled to erect and maintain residence crossings at their own expense, for the use and benefit of individuals, when no statute existed at the time of the construction of the road requiring such action on their part. People v. Detroit, G. H. & M. R. Co., 79 Mich. 471, 44 N. W. 934.

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may be subjected to this kind of police regulation are very well explained in a decision of the United States supreme court, from which we quote as follows: "The conclusions of this court have been repeatedly announced to the effect that though railroad corporations are private corporations, as distinguished from those created for municipal and governmental purposes, their uses are public, and they are invested with the right of eminent domain only to be exercised for public purposes; that therefore they are subject to legislative control in all respects necessary to protect the public against danger, injustice, and oppression; that the state has power to exercise this control through boards of commissioners; that there is no unjust discrimination and no denial of the equal protection of the laws in regulations applicable to all railroad corporations alike; nor is there necessarily such denial, nor an infringement of the obligation of contracts, in the imposition upon them, in particular instances, of the entire expense of the performance of acts required in the public interest, in the exercise of legislative discretion; nor are they thereby deprived of property without due process of law, by statutes under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious; and that the adjudication of the highest court of a state that, in such particulars, a law enacted in the exercise of the police power of the state is valid, will not be reversed by this court on the ground of an infraction of the constitution of the United States." [62]

Regulation of Trades and Professions.

In the exercise of the police power, the state may limit the right of employment. Trades and kinds of business which are essentially noxious may be altogether prohibited by the legislature, if it shall deem such action conducive to the public welfare. No person can have a right to engage in the business of gambling, prostitution, or any other avocation which is contra bonos mores. So also, the legislature may lawfully forbid the prosecution of any business which, though not inherently vicious or immoral, is regarded as contrary to public policy, or amounts to a depredation upon the lawful rights of others. An illustration of this would be the business which is

[62] New York & N. E. R. Co. v. Town of Bristol, 151 U. S. 556, 14 Sup. Ct. 437.

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popularly known as "ticket scalping." [63] In the next place, there are certain occupations and professions in which the safety of the public, in regard to life, health, or property, is closely and vitally dependent upon the possession, by those who practice them, of a competent degree of skill, knowledge, or technical training. And it is within the police power of the state to restrict the right to engage in such professions or occupations to those persons who can show, in some prescribed manner, a satisfactory qualification for their pursuit. This principle applies to the professions of physicians and surgeons,[64] attorneys at law,[65] druggists and pharmacists,[66] plumbers,[67] pilots, masters of ships, and others. In some states, the statutes require that telegraph operators shall have a year's experience, and be examined, and procure a certificate of competency, before being employed on a railroad. And a state statute requiring all locomotive engineers to be examined and licensed by a state court, is valid and constitutional.[68] So also is a law requiring, in the case of certain classes of employés on railroads, an examination and certificate of fitness, as regards color blindness and defective vision, from a

[63] A statute designed to prevent "ticket scalping," which gives to the regularly appointed agents of railroad companies the exclusive right of selling their transportation tickets, and forbids outsiders from dealing in such tickets, is not unconstitutional as a grant of special privileges to carriers, nor on other grounds. State v. Corbett, 57 Minn. 345, 59 N. W. 317; Burdick v. People, 149 Ill. 600, 36 N. E. 948; Fry v. State, 63 Ind. 552.

[64] Dent v. West Virginia, 129 U. S. 114, 9 Sup. Ct. 231; People v. Phippin, 70 Mich. 6, 37 N. W. 888; Hewitt v. Charier, 16 Pick. 353; Ex parte Spinney, 10 Nev. 323; Austin v. State, 10 Mo. 591; State v. Forcier, 65 N. H. 42, 17 Atl. 577; Wilkins v. State, 113 Ind. 514, 16 N. E. 192. But a statute regulating the practice of medicine which should discriminate in favor of or against one school of medicine would not be valid. White v. Carroll, 42 N. Y. 161.

[65] In re Bradwell, 55 Ill. 535; Bradwell v. Illinois, 16 Wall. 130. But while the right to practice law is a privilege, it is one of which the individual cannot be arbitrarily deprived. That is, an attorney cannot be disbarred except upon the regular presentation of specific and adequate charges against him, and after an opportunity to appear and be heard in his own defense. Percy's Case, 36 N. Y. 651.

[66] State v. Heinemann, 80 Wis. 253, 49 N. W. 813.

[67] Singer v. Maryland, 72 Md. 464, 19 Atl. 1044.

[68] Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. 564.

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state board of medical men.[69] In the next place, in regard to persons who are physically unfitted for the more toilsome kinds of labor, as women and children, the state may prohibit, or regulate, their employment in those trades which are considered to be detrimental to their health and strength. And there are pursuits from which it is proper that females or those of immature years should be withheld, on account of the evil influences to which they would be exposed. Here the intervention of the state is to be justified on the ground of public morality. Thus, the grant of licenses to sell liquor may be restricted to men and denied to women.[70] And so a statute is valid, and a constitutional exercise of the police power, which forbids the exhibition of any female child, under the age of fourteen years, as a dancer, or in any theatrical exhibition, or in any exhibition dangerous or injurious to the life, limbs, health, or morals of the child.[71] On a somewhat different ground, it is held to be competent to forbid the exercise within the limits of a city, or within certain designated parts of the city, of any trade which is a nuisance or hurtful to the inhabitants, or dangerous to the health of the community, or attended by noisome or injurious odors.[72] And in this same general class of laws we must include those which regulate the carrying on of laundries in cities,[73] and those providing for the licensing and regulating of the trade of junk-dealers, pawnbrokers, and hawkers and peddlers. The police power is also manifested in laws prohibiting restaurants to be kept open after a certain hour in the evening,[74] and providing that no intoxicating liquors shall be used or kept in any refreshment saloon or restaurant within a city.[75]

[69] Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 9 Sup. Ct. 28.

[70] Blair v. Kilpatrick, 40 Ind. 312. As to the validity of laws prohibiting the employment of women in drinking saloons, under a constitutional provision that "no person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession," see In re Maguire, 57 Cal. 604; Ex parte Hayes, 98 Cal. 555, 33 Pac. 337.

[71] People v. Ewer, 141 N. Y. 129, 36 N. E. 4.

[72] Slaughter-House Cases, 16 Wall. 36; Ex parte Shrader, 33 Cal. 279.

[73] Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357; Ex parte White, 67 Cal. 102, 7 Pac. 186.

[74] State v. Freeman, 38 N. H. 426.

[75] State v. Clark, 28 N. H. 176.

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Regulation of Charges and Prices.

It was once customary, in England and on the continent, for laws or royal proclamations to be issued regulating the rates of charges to be made for various kinds of services, the wages of labor, and also the price of various commodities. But the modern idea of freedom in business requires that such matters shall be left almost wholly to private arrangement. Government interference, in fixing wages or prices, is regarded as an unlawful invasion of personal liberty, except in so far as it may be justified by public exigencies. There are still, however, some cases in which private arrangements may be controlled by public law, under the police power. The authorities have the power to fix or regulate prices and charges when the business in question is one "affected with a public interest." "Looking to the common law," says Chief Justice Waite, "we find that when property is 'affected with a public interest, it ceases to be juris privati only.' This was said by Lord Chief Justice Hale more than two hundred years ago, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created."[76] It is not easy to say what the phrase "affected with a public interest" exactly means. But the authorities appear to use it as descriptive of a business which is indispensable to the comfort or convenience of the whole community, or which directly affects so large a proportion of the people that the public prosperity and welfare may be considered to depend, in some measure, upon its being conducted upon fair and just principles and without unreasonable exactions. But even in respect to occupations of this class, the power of the state is limited by the rule that a power to limit or regulate is not a power to destroy, and the legislature may not compel such persons to lend their services without reward, nor can it appropriate their property for public use except upon compen-

[76] Munn v. Illinois, 94 U. S. 113, 126.

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sation made; neither can it, in the exercise of this power, establish regulations obviously and grossly unjust or discriminating.[77]

The class of persons whose business is affected with a public interest clearly includes common carriers. Thus, in consequence of the public nature of the services performed by railroad companies, the state has power to regulate the charges they may make for their services and accommodations, at least in so far as to require that they shall not be unreasonable in amount.[78] And this may be done through the intervention of a railroad commission appointed by state authority.[79] And on a similar principle, it is competent for the state to regulate the rate of charges to be made for the storage of grain in elevators, which are declared by the state constitution to be public warehouses.[80] So, also, public mills, whether

[77] Munn v. Illinois, 94 U. S. 113; Wabash, St. L. & P. Ry. Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. 4.

[78] Chicago, B. & Q. R. Co. v. Iowa, 94 U. S. 155; Dow v. Beidelman, 125 U. S. 680, 8 Sup. Ct. 1028. But when a state legislature establishes a tariff of railroad rates so unreasonable as practically to destroy the value of the property of the companies engaged in the carrying business, courts of the United States may treat it as a judicial question, and hold such legislation void, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws. St. Louis & S. F. Ry. Co. v. Gill, 156 U. S. 649, 15 Sup. Ct. 484.

[79] But see Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 702. In this case it appeared that a statute of Minnesota required all railroads, in respect to such portion of their route as lay wholly within the state, to make equal and reasonable charges for their services as carriers. It also established a railroad commission, which was invested with power, whenever it should find that a carrier amenable to the statute was making unequal and unreasonable charges, to require it to adopt such charges as the commission should declare to be equal and reasonable. The law was so framed as to make the decision of the commission final and conclusive, and it gave the carrier no opportunity to contest the reasonableness of the tariff of rates which it was required to adopt, but laid it open to punishment for failure to comply with the orders of the commission. This statute was held to be unconstitutional and void, on account of the arbitrary power which it lodged in the commission, in a matter which was properly of judicial cognizance, and deprived the carrier of its constitutional right to a hearing by due process of law.

[80] Munn v. Illinois, 94 U. S. 113; Budd v. New York, 143 U. S. 517, 12 Sup. Ct. 468.

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for the sawing of lumber or the grinding of grain, are dedicated to a public use, so far as that the legislature may lawfully regulate the manner of their use and the rates of toll to be charged.[81] And it is said that the business of insurance against loss by fire is a proper subject for regulation, under the exercise of the police power of the state.[82]

Regulation of Labor.

In regard to the extent to which state interference may rightfully go in the regulation of labor and industrial employment, the rule deducible from the best authorities must be stated to be this: Any and all laws may be passed which may be necessary to protect the physical safety, health, or morals of the classes employed in these pursuits, or of the general public as affected by them, but beyond this the authority of the state is generally limited by the right of private contract. To illustrate, a law prohibiting the employment of women and children in laboring in any manufacturing establishment more than sixty hours per week, is valid and constitutional.[83] And so is a statute prescribing the means and manner of ventilation to be adopted in coal mines for the safety and health of persons employed therein.[84] Nor could any constitutional objection be taken to laws requiring employers who use dangerous machinery to take reasonable precautions to protect their servants from injury. In Michigan, it is said that, in the exercise of the police power, the state may prescribe regulations for the protection of those who, by their contract of employment, willingly perform dangerous service, and have no legal remedy if injured; such as acts requiring fire escapes on high buildings, requiring dangerous machinery to be covered or otherwise made safe, requiring emery wheels to be provided with blowers to carry off the dust, and the like.[85] In a late work it is stated that "New York and Massachusetts have passed laws to regulate the manufacture and sale of clothing made in unhealthful places, directed against the so-called 'sweating system.' The Massa-

[81] State v. Edwards, 86 Me. 102, 29 Atl. 947.
[82] Com. v. Vrooman, 164 Pa. St. 306, 30 Atl. 217.
[83] Com. v. Hamilton Manuf'g Co., 120 Mass. 383.
[84] Com. v. Bonnell, 8 Phila. 534.
[85] People v. Smith (Mich.) 66 N. W. 382.

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chusetts statute requires a license to be obtained and a label to be used with the words 'Tenement Made.' The New York statute requires a permit and a tag giving the state and town where the articles are made. These laws have yet to pass the test of the courts."[86] But undoubtedly there are sufficient reasons to justify their enactment. But on the other hand, laws have been passed in several of the states limiting the hours of labor, or providing that so many hours shall constitute a day's work. So far as regards the employment of women and children, the welfare of society is so intimately connected with regulations of this kind that there can be no question as to their validity. Where the regulation applies (as in some states) to employés on railroads, such as conductors and locomotive engineers, it is easily seen that the safety of travelers may depend on their not being overworked. In other cases, the law allows employer and employé to agree upon different hours. But where none of these circumstances apply, it is very doubtful whether such laws do not unwarrantably interfere with the right of contract.[87] A statute requiring certain classes of corporations to pay their employés' wages once a week is unconstitutional for this reason.[88] And the same is true of a statute forbidding mining and manufacturing companies to keep truck stores or to pay wages in store orders.[89] (Where such stores are maintained, the employés are generally required to take out a part of their wages in clothing, groceries, or

[86] Prent. Police Powers, 61, note.

[87] In Colorado, it is held that a law prohibiting mining and manufacturing companies to contract with their employés for labor for more than eight hours a day is in violation of the right of parties to make their own contracts, under the fourteenth amendment and the constitution of the state. In re Eight-Hour Bill, 21 Colo. 29, 39 Pac. 328. On the other hand, by Rev. St. U. S. § 3738, it is provided that "eight hours shall constitute a day's work for all laborers, workmen, and mechanics employed by or on behalf of the government of the United States." On the construction of this statute, see U. S. v. Martin, 94 U. S. 400.

[88] Braceville Coal Co. v. People, 147 Ill. 66, 35 N. E. 62. Compare State v. Brown & Sharpe Manuf'g Co., 18 R. I. 16, 25 Atl. 246.

[89] Frorer v. People, 141 Ill. 171, 31 N. E. 395; State v. Loomis, 115 Mo. 307, 22 S. W. 350; Godcharles v. Wigeman, 113 Pa. St. 431, 6 Atl. 354; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285; Hancock v. Yaden, 121 Ind. 366, 23 N. E. 258. And see Archer v. James, 2 Best & S. 67, 78.

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other supplies from the store. That is, they are paid, wholly or in part, in orders on the stores, whereby the company makes a profit). In Massachusetts, a statute providing that "no employer shall impose a fine upon, or withhold the wages or any part of the wages of, an employé engaged at weaving, for imperfections that may arise during the process of weaving," was held unconstitutional.[90] And in Illinois, the same conclusion was reached with regard to a law which provided that, in all cases where miners were paid on the basis of the amount of coal mined, the coal should be weighed on the pit cars before being screened, and the compensation should be computed on the weight of the unscreened coal. The court said: "There is nothing in the business of coal mining which renders either the employer or employé less capable of contracting in respect to wages than in any of the other numerous branches of business in which laborers are employed under analogous conditions."[91]

Regulation of Rights of Property.

The police power of the state over private property and rights of property is based on the principle that all property is held subject to the supervision of the government, in order that it may prevent the use of property to the injury or prejudice of others. Many limitations upon the owner's absolute control of his property, imposed by authority of the government in order to restrain him from so using it as to work detriment to the community or to the rights of other owners, have been noticed or suggested in what has already been said in this chapter. For example, the use of property for the carrying on of noxious, offensive, or dangerous trades, may be prohibited or regulated. And in the exercise of the same power, the right to acquire and hold real estate may be restricted to native or naturalized citizens. Again, there is "a power of the legislature to establish regulations by which adjoining lands, held by various owners in severalty, and in the improvement of which all have a common interest, but which, by reason of the peculiar natural condition of the whole tract, cannot be improved or enjoyed by any of them without the concurrence of all, may be reclaimed and made useful to all at their joint expense."[92] Or, as it is stated by the

[90] Com. v. Perry, 155 Mass. 117, 28 N. E. 1126.

[91] Ramsey v. People, 142 Ill. 380, 32 N. E. 364.

[92] Wurts v. Hoagland, 114 U. S. 606, 5 Sup. Ct. 1086.

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court in New Jersey, "It is in the power of the government to prescribe public regulations for the better and more economical management of property of persons whose property adjoins, or which, for some other reason, can be better managed and improved by some joint operation, such as the power of regulating the building of party walls, making and maintaining partition fences and ditches, constructing ditches and sewers for the drainage of uplands or marshes, which can more advantageously be drained by a common sewer or ditch."[93] On this principle, a statute authorizing milling companies to overflow the lands of upper riparian proprietors, by the construction of their dams and other works, upon payment of proper compensation for the injury caused thereby, is not an unlawful appropriation of property to private uses, nor does it deprive such persons of their property without due process of law. Such an act "is clearly valid as a just and reasonable exercise of the power of the legislature, having regard to the public good, in a more general sense, as well as to the rights of the riparian proprietors, to regulate the use of the water power of running streams, which without some such regulation could not be beneficially used."[94] Again, many of the authorities hold that the legislature, acting as the guardian and protector of those who are disabled to act for themselves by reason of infancy, lunacy, or other like cause, may constitutionally pass either general or private laws under which an effectual disposition of their property may be made. And in some of the cases such a power is justified (with more or less distinctness) as a part of the police power.[95]

[93] Coster v. Tide-Water Co., 18 N. J. Eq. 54. And see Turner v. Nye, 154 Mass. 579, 28 N. E. 1048. But in a case in Massachusetts, it appeared that a provincial statute authorized persons building brick or stone houses in Boston to set half the partition wall on the adjoining lot, and provided that the adjoining owner, when he came to build, might use such wall, on paying half its cost. This act was held void. The police power, it was said, "does not justify authorizing one man to appropriate and use the property of another without his consent and without adequate compensation." Wilkins v. Jewett, 139 Mass. 29, 29 N. E. 214.

[94] Head v. Manufacturing Co., 113 U. S. 9, 5 Sup. Ct. 441.

[95] See Brevoort v. Grace, 53 N. Y. 245; Rice v. Parkman, 16 Mass. 326.

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Laws Against Fraud and Oppression.

The protection of the whole community, or of classes of individuals, against fraud, overreaching, and oppression, is a legitimate department of the police power. Historically this is shown by the old market laws, against engrossing and forestalling, and the criminal laws against fraud and conspiracy which have always existed; and theoretically it is justified by the consideration that one of the functions of the state is to protect all citizens in the equal enjoyment of their rights. "The decisions," says a learned judge, "show that the right of self-preservation, which exists in the commonwealth no less than in the individual, may, in some circumstances, justify limitations upon freedom of contract, and that when for any reason (for instance, the existence of a monopoly) real liberty of action is wanting on the side of one of the parties, in dealings forming part of the activities of civilized society, a reasonable check may justly be placed by law upon the power of the other to oppress his fellow citizen." [96] And it is to this head that we must refer the laws for the protection of infants, married women, lunatics, and seamen, in their business dealings. But no such power is applicable to the contracts and employment of laboring men, merely as such, as has been already shown. Usury laws proceed upon the theory that the lender and the borrower of money do not occupy the same relations of equality that parties do in contracting with each other in respect to other matters, and that the borrower's necessities deprive him of freedom in contracting and place him at the mercy of the lender.[97] On the same general principle are to be considered the statutes regulating dealings in patent rights, those providing for the inspection of goods intended for sale or export,[98] those for the inspection and regulation of weights and measures,[99] those regulating the weight of bread,[100] and ordinances requiring hay and coal to be weighed on public scales or by public weighers.[101]

[96] State v. Loomis, 115 Mo. 307, 22 S. W. 350, dissenting opinion of Barclay, J.

[97] Frorer v. People, 141 Ill. 171, 31 N. E. 395.

[98] Turner v. Maryland, 107 U. S. 38, 2 Sup. Ct. 44.

[99] Ritchie v. Boynton, 114 Mass. 431.

[100] Mayor of Mobile v. Yuille, 3 Ala. 137.

[101] Stokes v. New York, 14 Wend. (N. Y.) 87; Yates v. City of Milwaukee,

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And so, in New York, the court sustained a law which was intended to empower manufacturers of sparkling and aerated waters to stamp their bottles with a device or trade-mark and have the same registered, and which made it a criminal offense for all other persons to fill such bottles with the substances for which they were intended, or to sell the same without the written consent of the manufacturer or unless purchased from him.[102]

Same—Monopolies, Trusts, Strikes, and Boycotts.

Trusts, monopolies, corners, engrossing of the market, and other combinations in restraint of trade or intended to raise prices, are all unlawful at common law, and it is within the police power of the state to prohibit them or punish those promoting them. All contracts which have a tendency to stifle competition, or to create or foster monopolies, with a view unreasonably to increase the market price of commodities, are against public interest and contrary to public policy.[103] For instance, a "corner," whether to affect the price of articles of commerce or the price of vendible stocks, by confederation to raise or depress the price and operate on the markets, is a conspiracy.[104] A pool or trust formed by the manufacturers of a given commodity, giving to a central committee exclusive authority to regulate the price and grade thereof, and prohibiting the members of the association from selling the article except through the trust, and at the established prices, tends to create a monopoly in restraint of trade, and is void as against public policy, and will not be aided by the courts.[105] The congress of the United States, so far as the matter lies within its jurisdiction, has taken action to prevent the formation of such trusts and pools. An act of 1890 declares that all contracts, combinations, or conspiracies in restraint of trade are illegal, and makes it a misdemeanor for any person to make or engage in them, or to monopolize, or attempt or conspire with others to monopolize, any part of the trade or commerce among the several states or

[102] People v. Cannon, 139 N. Y. 32, 34 N. E. 759.

[103] Texas & P. Ry. Co. v. Southern Pac. Ry. Co., 41 La. Ann. 970, 6 South. 888.

[104] Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173.

[105] Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666.

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with foreign nations.[106] So, also, the interstate commerce act forbids carriers subject to its provisions from entering into any agreement for pooling the freights, or dividing the gross or net earnings, of different and competing railroads.[107] In the absence of some such statute, the illegality of such combinations is not perfectly clear. In some states, it is held that an agreement forming a traffic association between a number of railroad companies, by which a managing committee is authorized to fix freight rates, no member being allowed to reduce them, is illegal.[108] But in others it is considered that a contract between rival and competing railroads, made for the purpose of preventing competition, but not for the purpose of raising the prices of transportation above a reasonable standard, is not against public policy.[109]

Strikes and boycotts, when accompanied by, or resulting in, any trespass upon the rights or property of others, or operated by means of violence, threats, or any coercive measures, are likewise illegal, and sometimes amount to breaches of the criminal laws. In an early and leading case on this subject it was held that an indictment lay against certain journeymen tailors for conspiring to raise the price of their labor by refusing to work until the increase demanded should be granted them.[110] So, also, it is an indictable conspiracy for several employés to combine and notify their employer that, unless he discharges certain enumerated persons, they will, in a body, quit his employment.[111] On the same general principle, a combination formed for the purpose of boycotting a person or firm is a criminal conspiracy and an indictable offense at common law.[112] Thus, a combination or conspiracy by a trades union to boycott a newspaper for refusing to unionize its office is illegal and unlawful, and will be enjoined by a court of equity; and equity will enjoin the publication and circulation of posters, hand-

[106] See U. S. v. Patterson, 55 Fed. 605.

[107] 24 Stat. 380, § 5.

[108] Gulf, C. & S. F. Ry. Co. v. State, 72 Tex. 404, 10 S. W. 81.

[109] Manchester & L. R. R. v. Concord R. R., 66 N. H. 100, 20 Atl. 383.

[110] Rex v. Journeymen-Tailors of Cambridge, 8 Mod. 10.

[111] State v. Donaldson, 32 N. J. Law, 151.

[112] Crump's Case, 84 Va. 927, 6 S. E. 620; State v. Stewart, 59 Vt. 273, 9 Atl. 559.

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bills, circulars, etc., printed and distributed in pursuance of such combination or conspiracy.[113]

Regulation of Roads and Streets.

The power of a municipal corporation to order sidewalks of a particular kind to be laid, and to assess against the abutting property owners an amount necessary to pay for the same, and to pay for keeping the same in repair and proper condition for the use of the public, is generally upheld upon the ground that it is a proper exercise of the police power. And it is held that a statute authorizing a city to contract for sprinkling and sweeping the streets at the cost of the property owners along the line of such streets, is valid and constitutional.[114] So, also, it has been held to be a competent exercise of the police power to require residents in cities to keep their sidewalks clear of ice and snow, under a penalty or under pain of having it removed by the public authorities at their expense. Such a law is not a tax or burden, and is not unequal or partial. The validity of such ordinances is sustained on the ground of the special power and opportunity which the individual residents possess to discharge this public duty with that despatch which the comfort and welfare of the whole community require, and also in view of their peculiar interest in its performance.[115] The right of a city to take the land of a riparian proprietor to enlarge a roadway which

[113] Casey v. Union, 45 Fed. 135.

[114] Reinken v. Fuehring, 130 Ind. 382, 30 N. E. 413. The same principle applies to grading, curbing, or paving streets and laying sewers, at the cost, or partly at the cost, of abutting lot owners, the point, in all these cases, being that the charge upon such owners is not a tax but a local assessment for special benefits, and that they cannot complain that they are deprived of their property without due process of law or without compensation. But it is very doubtful whether these enactments are referable to the police power, properly and strictly so called. If such statutes are not unconstitutional as an exercise of the power of taxation, in a modified form, it is enough, and the police power need not be invoked for their justification.

[115] Goddard, Petitioner, 16 Pick. (Mass.) 504; Village of Carthage v. Frederick, 122 N. Y. 268, 25 N. E. 480. But in Illinois, the courts have refused to sustain laws of this character, holding that the sidewalk is a part of the public highway, under the care and control of the municipality, and in which the abutting lot owner has no other or different interest than all the other citizens. Gridley v. City of Bloomington, 88 Ill. 554; City of Chicago v. O'Brien, 111 Ill. 532.

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has been encroached on by the waters of the river is an exercise of the police power vested in the city by the state, and not of the power of eminent domain; and hence an ordinance directing the appropriation of land for such a purpose, without compensation to the riparian proprietor, is not unconstitutional.[116]

Game Laws.

The preservation of game and fish has always been treated as within the proper domain of the police power, and laws limiting the season within which birds or wild animals may be killed or exposed for sale, and prescribing the time and manner in which fish may be caught, have been repeatedly upheld by the courts.[117] And the prohibition may be extended so as to include fish which have been artificially propagated or maintained.[118]

State Engaging in Business.

The police power of a state to regulate a business does not include the power to engage in carrying on that business. On this ground a statute of Minnesota, providing for the building and maintaining, at the charge of the state, and under the supervision of a commission, of a warehouse and grain elevator, was held unconstitutional.[119] And the reader will remember that this was also the objection which at first prevailed against the South Carolina dispensary law, mentioned a few pages earlier. In Massachusetts, it is held that the furnishing of gas and electricity for illuminating purposes is a public service. And the performance of this service can be delegated by the legislature to cities and towns for the benefit of themselves and their inhabitants, and such cities and towns may be authorized to impose taxes for this purpose upon their inhabitants, and to establish reasonable rates which the inhabitants who use the gas or electricity may be compelled to pay.[120] But in the same state, a few

[116] Ruch v. City of New Orleans, 43 La. Ann. 275, 9 South. 473.

[117] Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. 499.

[118] Com. v. Gilbert, 160 Mass. 157, 35 N. E. 454.

[119] Rippe v. Becker, 56 Minn. 100, 57 N. W. 331.

[120] Opinion of the Justices, 150 Mass. 592, 24 N. E. 1084. The same decision was made in Ohio in regard to cities furnishing a supply of natural gas for public and private use, and issuing bonds to cover the expense of the wells, works, etc. State v. City of Toledo, 48 Ohio St. 112, 26 N. E. 1061.

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years later, when the legislature propounded the following question to the supreme court: "Is it within the constitutional power of the legislature to enact a law conferring upon a city or town within this commonwealth the power to purchase coal and wood as fuel, in excess of its ordinary requirements, for the purpose of selling such excess, so purchased, to its own citizens?" a majority of the court (five judges out of seven) answered it in the negative.[121]

LIMITATIONS OF THE POLICE POWER.

155. It is necessary to the validity of police regulations that they should not—

(a) Violate any provision of the federal or state constitution.

(b) Interfere with the exclusive jurisdiction of congress.

(c) Unlawfully discriminate against individuals or classes.

(d) Be unreasonable.

(e) Invade private rights of liberty or property unnecessarily.

(f) They must actually relate to some one or more of the objects for the preservation of which this power may be exercised, and be proper and adapted to that purpose.

Limitations under Federal Constitution.

In the nice adjustment of rights and powers between the states and the Union, questions frequently arise which require a determination of the relative scope of the police power of the state and the authority vested in congress. In such cases, the integrity of each must be preserved, without encroachment upon the other. The jurisdiction secured to the federal government by the constitution sets a limit to the police power of the states. "The subjects

[121] Opinion of the Justices, 155 Mass. 598, 30 N. E. 1142. These cases are interesting and important as tending to show how our constitutions are opposed to state socialism, or to the wielding of municipal powers in the direction of co-operative business enterprises.

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upon which the state may act are almost infinite; yet in its regulations in respect to all of them there is this necessary limitation, that the state does not thereby encroach upon the free exercise of the power vested in congress by the constitution." [122] Yet a state has the same unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, where that jurisdiction is not surrendered or restrained by the federal constitution, and "all those powers which relate to merely municipal legislation, or what may perhaps more properly be called internal police, are not thus surrendered or restrained, and consequently in relation to these, the authority of a state is complete, unqualified, and exclusive." [123] For instance, notwithstanding the exclusive power of congress to grant patents for inventions, it still remains within the power of each state to make reasonable police regulations to protect the purchaser of patent rights against fraud and imposition in their sale, and also to regulate, or exclude from its internal commerce, articles which its legislature may deem dangerous, noxious, or unfit for use, although covered by patents.[124] But while the state has power to protect itself by lawful police regulations, they must not be inconsistent with any of the terms of the national constitution, such as those provisions which guaranty to citizens of one state the rights and privileges of citizens in all the states, or which prohibit the states from abridging the privileges and immunities of citizens of the United States.[125] Again, the requirement that no state shall pass any law impairing the obligation of contracts imposes a limitation upon the police power. But if the alleged contract involves a relinquishment or surrender of that power to individuals or corporations, it is one which the legislature would have

[122] W. U. Tel. Co. v. Pendleton, 122 U. S. 347, 7 Sup. Ct. 1126.

[123] Mayor, etc., of City of New York v. Miln, 11 Pet. 102, 139.

[124] Patterson v. Kentucky, 97 U. S. 501; Reeves v. Corning, 51 Fed. 774; In re Brosnahan, 18 Fed. 62.

[125] For example, a state law providing for the inspection of animals intended to be slaughtered for human food cannot be regarded as a rightful exercise of the police power if the inspection prescribed is of such a character, or is burdened with such conditions, as will prevent the introduction into the state of sound meats, the product of animals slaughtered in other states. Minnesota v. Barber, 136 U. S. 313, 10 Sup. Ct. 862; Brimmer v. Rebman, 138 U. S. 78, 11 Sup. Ct. 213.

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no power to make, and therefore, being void, may be abrogated by the same or a succeeding legislature.[126] Again, neither under this power nor any other exercise of governmental authority, can the citizen be deprived of his property without due process of law. At the same time, it is "the settled doctrine that, as government is organized for the purpose, among others, of preserving the public health and the public morals, it cannot divest itself of the power to provide for those objects, and that the fourteenth amendment was not designed to interfere with the exercise of that power by the states." [127]

State Police Power and the Regulation of Commerce.

It is often difficult to determine the boundary line between the police power of the state and the commercial power of congress. But the solution is to be found in their co-ordination and not in their antagonism. The power of the national government to regulate foreign and interstate commerce, and the power of the individual state to enact regulations for its internal police, are co-ordinate powers. Each must be preserved entire, but neither must encroach upon the other. On the one hand, congress has no power,

[126] The leading case on this point is Beer Co. v. Massachusetts, 97 U. S. 25. The question at issue was whether the charter of a private corporation, authorizing it to engage in the manufacture of malt liquor, and, as incidental thereto, to dispose of the products, constituted a contract protected against subsequent legislation prohibiting the manufacture of liquors within the state. The beer company claimed the right under its charter to manufacture and sell beer without limit as to time, and without reference to any exigencies in the health or morals of the community requiring such manufacture to cease. It was decided that while the company acquired, by its charter, the capacity, as a corporation, to engage in the manufacture of malt liquors, its business was at all times subject to the same governmental control as like business conducted by individuals; and that the legislature could not divest itself of the power, by such appropriate means, applicable alike to individuals and corporations, as its discretion might devise, to protect the lives, health, and property of the people, or to preserve good order and the public morals. The prohibitory enactment of which the beer company complained was held to be a mere police regulation, which the state could establish even had there been no reservation of authority to amend or repeal its charter.

[127] Powell v. Pennsylvania, 127 U. S. 678, 8 Sup. Ct. 992, 1257; Munn v. Illinois, 94 U. S. 113; Munn v. People, 69 Ill. 80.

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under pretense of regulating commerce, to interfere with the domestic police of the state. On the other hand, the state has no power, under pretense of police regulations, to interfere with the paramount control of congress over commerce. "The police power of a state and the foreign commercial power of congress must stand together. Neither of them can be so exercised as materially to affect the other. The sources and objects of these powers are exclusive, distinct, and independent, and are essential to both governments. The one operates upon our foreign commerce, the other upon the internal concerns of a state."[128] While a state, for example, in the exercise of its police power, may enact sanitary laws, quarantine laws, and reasonable inspection laws, and while it may take such action as will prevent the introduction into the state of convicts, paupers, and persons or animals suffering from contagious or infectious diseases, yet it may not interfere with transportation into or through the state, beyond what is absolutely necessary for its self-protection. It may not, under cover of exerting its police power, substantially burden or prohibit either foreign or interstate commerce.[129] A tax on immigrants is an unlawful interference with foreign commerce, and cannot be justified as an exercise of the police power.[130] But on the other hand, a state law authorizing the erection of a dam across a small navigable creek, in order to exclude the tide and reclaim an unhealthy marsh, is not a regulation of commerce, but the exercise of the right, common to every state, to adopt such measures as will, in the opinion of the legislature, promote the health of the inhabitants or give additional value to the land.[131]

The limitation of the police power of the state, when it comes in conflict with the commercial power of congress is well illustrated

[128] License Cases, 5 How. 504, 592; Robbins v. Shelby Co. Taxing Dist., 120 U. S. 489, 7 Sup. Ct. 592; Sherlock v. Alling, 93 U. S. 99. A police regulation of a state prohibiting the running of freight trains on Sunday is not invalid, as interfering with interstate commerce, although in effect it prevents freight trains from passing through the state on that day from and to adjacent states. Hennington v. Georgia, 163 U. S. 299, 16 Sup. Ct. 1086.

[129] Railroad Co. v. Husen, 95 U. S. 465. And see Kimmish v. Ball, 129 U. S. 217, 9 Sup. Ct. 277.

[130] Henderson v. Mayor of City of New York, 92 U. S. 259.

[131] Willson v. Blackbird Creek Marsh Co., 2 Pet. 245.

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by certain decisions touching the traffic in intoxicating liquors (a subject admittedly within the general scope of the police power) to which we now direct the attention of the reader. It had been settled that, as regards foreign commerce, the power of congress was exclusive, and that no state had the power, by taxation, license laws, or otherwise, to impose any burden upon the importation or sale of any article authorized by the laws of congress to be imported into the country, so long as it remained in the hands of the importer and in the original bale, package, or vessel in which it was imported.[182] But it was supposed that the rule in regard to commerce between the states was different, at least to the extent that the several states might legislate upon the subject unless and until congress should pass an act occupying the ground. In the case of Pierce v. New Hampshire [183] the inquiry was as to the constitutionality of a law of New Hampshire, prohibiting the sale of liquor without a license, in its application to a case where the article sold was a barrel of American gin, purchased in Boston, and carried coastwise to a landing in New Hampshire and there sold by the importer in the same barrel. It was adjudged that the state law might validly apply to a sale under these circumstances, and that, in such application, it was not inconsistent with the provisions of the federal constitution. The grounds of this decision were summed up by Taney, C. J., in his opinion in the case, as follows: "Upon the whole, the law of New Hampshire is in my judgment a valid one. For although the gin sold was an import from another state, and congress have clearly the power to regulate such importations, under the grant of power to regulate commerce among the several states, yet, as congress has made no regulation on this subject, the traffic in the article may be lawfully regulated by the state as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or a sale altogether prohibited, according to the policy which the state may suppose to be its interest or duty to pursue." And thus the law remained for many years. It was the settled doctrine that liquors transported from one state into another were subject to the laws of the latter state relating to their sale, to the same extent as any other liquors already lawfully with-

[182] Brown v. Maryland, 12 Wheat. 419. [183] License Cases, 5 How. 504.

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in the state, and could not be sold at the place of destination, either in the original packages or other form, except as the laws of the state might prescribe; and that the police power of the state, so exercised, did not infringe on the power delegated to congress to regulate interstate commerce. But in 1890, a similar question came again before the United States supreme court, in the case of Leisy v. Hardin,[184] and then the License Cases were overruled. It was held that, inasmuch as interstate commerce, consisting in the transportation, purchase, sale, and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as congress does not pass any law to regulate it, or allowing the states to do so, it thereby indicates its will that such commerce shall remain free and untrammeled; that restrictions upon the sale of articles imported from one state into another, so long as they continue to be objects of interstate commerce, are unlawful invasions of the exclusive power of congress; and that, in consequence of these rules, the prohibitory liquor law of Iowa, in so far as it forbade the sale of liquors imported from another state, by the importer thereof, in the original and unbroken packages of their importation, was unconstitutional and void. The effects of this decision, so far as concerns the particular case of intoxicating liquors, were counteracted by the act of congress passed the same year, and commonly called the "Wilson Law."[185] But still the rule in Leisy v. Hardin remains as an authority for the proposition that, whether or not congress has legislated upon any particular branch, department, or subject of interstate commerce, it is not within the lawful power of the states to lay any burden or restriction thereon directly and materially affecting either the transportation or the sale of the same, and the allegation of the police power is no justification for an unwarranted interference with the exclusive domain of the national government in this regard.

Unreasonable Laws and Unjust Discriminations.

Police regulations must not be unreasonable, nor must they make unjust discriminations against individuals or classes. For example,

[184] Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681. This is the case called the "Original Package Decision."

[185] Upon this statute and its constitutional validity, see In re Rahrer, 140 U. S. 545, 11 Sup. Ct. 865.

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an ordinance of the city of San Francisco set apart a certain district or portion of the city for the Chinese quarter, required all Chinamen to remove into such quarter, and required them thereafter to confine their residences and business establishments to such quarter, under heavy penalties. It was held that this was void. It was not a valid exercise of the police power of the state or city, because it operated as an unjust and oppressive discrimination against the Chinese, and did not profess to make any distinction between those individuals who might be dangerous or noxious to the safety or health of the city and those who were not thus objectionable.[126] Again, an ordinance which professed to regulate the establishment of laundries in wooden buildings, but which in effect gave to a board of supervisors an arbitrary and uncontrollable power to allow or prohibit the use of such buildings for that purpose, at their mere pleasure, and as concerned both persons and places, and which was in fact so enforced as to discriminate unjustly against the Chinese, was held void.[127] And so, while a city undoubtedly has the right to regulate the use of its streets, with a view to securing the peace and comfort of its inhabitants, yet its ordinances must be general and impartial, and applicable to all alike. And hence an ordinance which is aimed especially at the "Salvation Army," and designed to prevent their parading in the streets, by giving to the mayor arbitrary power to grant or refuse permission for such processions, operates as an unreasonable and unjust discrimination, and is not valid.[128] The same decision was made in regard to an ordinance which prohibited the erection of any steam engine within the limits of the city unless by permission of the mayor and council, and then subject to their power to revoke the permit.[129] The legislature of New York passed a statute making it a misdemeanor to manufacture cigars, in cities of more than 500,000 inhabitants (which included only New York and Brooklyn) in any tenement house occupied by more than three families, except on the first floor of houses in which there was a store for the sale of cigars and tobacco. This was held unconstitutional, for reasons similar to those which de-

[126] In re Lee Sing, 43 Fed. 359.

[127] Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064.

[128] State v. Dering, 84 Wis. 585, 54 N. W. 1104.

[129] Mayor, etc., of Baltimore v. Radecke, 49 Md. 217.

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termined the cases already mentioned.[140] To take one more illustration, a city ordinance required a railroad company to keep a flagman stationed at a particular street crossing. But the court considered, under all the circumstances of the case, that the danger to the public at this particular crossing was not sufficient to authorize the municipality to put the railroad to that trouble and expense, but could be sufficiently averted by other and simpler means. It was therefore held that the ordinance was unreasonable, and for that reason void.[141]

Provinces of the Courts.

"Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated, intended, convenient, and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen, or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health. It matters not that the legislature may, in the title to the act, or in its body, declare that it is intended for the improvement of the public health. Such a declaration does not conclude the courts, and they must yet determine the fact declared and enforce the supreme law." [142] "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those ob-

[140] In re Jacobs, 98 N. Y. 98.

[141] Toledo, W. & W. Ry. Co. v. City of Jacksonville, 67 Ill. 37.

[142] In re Jacobs, 98 N. Y. 98.

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jects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution." [143]

Federal Revenue System and State Police Power.

A license granted by the United States, under the internal revenue laws, to carry on any species of business (as, that of a liquor dealer) in a particular state named, although it has been granted in consideration of a fee paid, does not give the licensee power to carry on the business in violation of the state laws forbidding such business to be conducted within its limits; nor does it relieve the holder from the necessity of taking out any license required by the laws of the state, if that is the system therein prevailing.[144]

[143] Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273. See, also, Ex parte Hodges, 87 Cal. 162, 25 Pac. 277.

[144] License Tax Cases, 5 Wall. 462; McGuire v. Massachusetts, 3 Wall. 387.

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CHAPTER XV.

THE POWER OF TAXATION.

156–157. General Considerations.
158. Independence of Federal and State Governments.
159. Limitations Imposed by Federal Constitution.
160–161. Limitations Imposed by State Constitutions.
162–163. Purposes of Taxation.
164–165. Equality and Uniformity in Taxation.
166. Taxation and Representation.
167. Taxation under the Police Power.

GENERAL CONSIDERATIONS.

156. The power of taxation is an essential and inherent attribute of sovereignty and belongs as a matter of right to every independent state or government, and it is as extensive as the range of subjects over which the power of that government extends.

157. Taxes are ratable burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes.

Taxes are a ratable portion of the produce of the property and labor of the individual citizens, taken by the nation or the state, in the exercise of its sovereign rights, for the support of government, for the administration of the laws, and as the means for continuing in operation the various legitimate functions of the state.[1] "The power of taxing the people and their property," says Chief Justice Marshall, "is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. That is, in general, a sufficient security against erroneous and oppressive taxation.

[1] Black, Tax Titles, § 2.

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The people of a state therefore give to their government a right of taxing themselves and their property, and as the exigencies of the government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse." [2]

But it is not consonant with the constitutional idea of a tax that it should be exacted from individuals in an arbitrary or discriminating manner. The idea of taxation implies equality of burdens, and a regular distribution of the expenses of government among those persons, or those classes of property, which are rightly subject to the burden of them. The requirement of apportionment is absolutely essential in any exercise of the power to tax. There can be no such thing as valid taxation when the burden is laid without rule, either in respect to the subjects of it or to the extent to which each must contribute.[3]

Again, the exaction of money from individuals under the power of taxation, and the appropriation of private property for public use by virtue of the power of eminent domain, should not be confused. In paying taxes, the citizen contributes his just and ascertained share to the expenses of the government under which he lives. But when his property is taken under the power of eminent domain, he is compelled to surrender to the public something above and beyond his due proportion for the public benefit. The matter is special. The particular estate is taken because the government has special need for it. It is in the nature of a compulsory sale to the state. Hence arises the justice and necessity of a constitutional provision for compensation to the owner.[4] Furthermore, taxes are not debts in the ordinary sense of that word. The state

[2] McCulloch v. Maryland, 4 Wheat. 316, 428. And see Pullen v. Commissioners, 66 N. C. 361.

[3] Black, Tax Titles, § 84; Henry v. Town of Chester, 15 Vt. 460; Tide-Water Co. v. Coster, 18 N. J. Eq. 518; Stuart v. Palmer, 74 N. Y. 183; City of Lexington v. McQuillan's Heirs, 9 Dana (Ky.) 513. A state may make the ownership of property subject to taxation relate to any day or period of the year which it may think proper. Shotwell v. Moore, 129 U. S. 590, 9 Sup. Ct. 362.

[4] Booth v. Town of Woodbury, 32 Conn. 130; People v. Mayor, etc., of Brooklyn, 4 N. Y. 419.

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may distrain and sell property for the payment of a tax, if not paid when demanded, without first obtaining a judgment, and as between it and creditors of the person owing the tax, the state is entitled to a preference. The claim of the government upon the citizen for the payment of taxes is paramount to all other claims and liens against his property.[5]

The power to tax is exclusively a legislative function, and cannot be exercised except in pursuance of legislative authority. A court has no taxing powers, and can impart none to the authorities of a municipal corporation. It has no jurisdiction to coerce the levy of a tax, except where the law has made it the clear and absolute duty of the proper authorities of the municipality to levy such tax.[6]

In respect to the kind of tax which shall be laid, and also in regard to the objects which shall be placed under its burdens, the legislature, as the representative of the sovereign people, must exercise its judgment and discretion, having in view the needs and conditions of the country. But the power to tax is of the broadest extent. "It is a power of unlimited force and most searching extent. It embraces every person and every object of property within the confines of the nation. It extends to every trade, profession, and employment. It covers every estate, interest, and evidence of debt. It has to do with the food we eat, it concerns itself with our labor and our amusements, and sometimes counts the windows of our houses. It imposes a burden which, in case of failure to discharge it, may be followed by seizure and sale or forfeiture of property."[7] But in this country the taxing power is subject to certain positive limitations, within which its exercise must be confined, in order to answer the requirement of legality. "Great as is the power of any sovereignty to levy and collect taxes from its citizens, it is not in a constitutional country without limitations which are of a very distinct and positive nature, and exist whether declared or not declared in the written constitution; but some of them it is not uncommon to specify, either out of abundant caution, or to keep them fresh in the minds of those who administer the gov-

[5] Jack v. Welennett, 115 Ill. 105, 3 N. E. 445.

[6] Board of Com'rs of Grand Co. v. King, 14 C. C. A. 421, 67 Fed. 202.

[7] Black, Tax Titles, § 4.

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ernment. Some others, in this country, spring from the peculiar form of the government and the relation of the states to the common authority. Still others are expressly imposed, either by the state constitution or by that of the Union."[8]

INDEPENDENCE OF FEDERAL AND STATE GOVERNMENTS.

158. The necessary independence of the federal and state governments imposes a limitation upon the taxing power of each. Neither can so exercise its own power of taxation as to curtail the rightful powers of the other, or interfere with the free discharge of its constitutional functions, or obstruct, embarrass, or nullify its legitimate operations, or destroy the means or agencies employed by it in the exercise of those powers and functions.

This limitation upon the taxing power is not expressed in the constitutions, but is to be implied from the nature of our system of government. No political community can in general lay assessments upon any subjects of taxation not within its territorial jurisdiction. But this axiom of law has a special and highly important application in this country, under our peculiar frame of government, which apportions the sovereign authority between the commonwealth and the nation, and gives to each, over certain subjects, an exclusive jurisdiction. Whatever pertains to this exclusive jurisdiction in either is eliminated from the taxing power of the other as completely as if it were beyond its territorial limits. In a leading case, the following rules were laid down as incontrovertible propositions: "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, in respect to those very measures, is declared to be supreme over that which exerts the control."[9] As a corollary from this rule it follows that the several states have no constitutional power to lay any tax upon the instruments, means, or agencies provided or selected by the United States to enable it to carry into execution its legitimate

[8] Cooley, Tax'n, 54. [9] McCulloch v. Maryland, 4 Wheat. 316, 431.

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powers and functions. This principle was applied in the celebrated case of McCulloch v. Maryland,[10] which involved the constitutionality of a law of Maryland imposing a tax upon the circulation of the Bank of the United States. And the same doctrine was invoked in an interesting case in California, which further illustrates the rule here in question. It appeared that the Western Union Telegraph Company owned and operated lines by authority of the federal government along the military and post roads of the United States, and over, under, and across the navigable waters thereof, and that it used its lines in the transmission of messages from state to state and to foreign countries, and that it was likewise engaged in the transmission over its wires of messages for, from, and between the several departments of the federal government, giving such messages priority over all other business, and sending them at rates annually fixed by the postmaster general. On this state of facts it was considered that the company was one of the means or instruments employed by the United States government for carrying into effect its sovereign powers, and consequently, within the rule in McCulloch v. Maryland, a state tax upon its franchise, in addition to the tax which, in common with others, it paid on its property, was beyond the power of the state and was void.[11]

In pursuance of the same general principle, it is held that the fiscal agents of the United States, the army and navy, the federal judicature, the public ships, the national institutions and property, and imported goods in the public warehouses, are all exempt from state taxation.[12] No state can impose taxes on property belonging to the United States, no matter how it was acquired or for what purpose it is used or held.[13] Thus, land lying within the borders of a state, but which still constitutes a portion of the public domain, and the legal and beneficial title to which remains in the United States, is not subject to any species of state taxation. Any assessment of taxes upon such land, as well as any proceedings for the collection of such taxes, are null and void, and can in no way

[10] 4 Wheat. 316.

[11] City and County of San Francisco v. W. U. Tel. Co., 96 Cal. 140, 31 Pac. 10.

[12] Howell v. State, 8 Gill (Md.) 14.

[13] People v. U. S., 93 Ill. 30.

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affect the interests of the government.[14] Moreover, the loans, money, and securities of the general government are beyond the taxing powers of the states. It is provided by statute that "all stocks, bonds, treasury notes, and other obligations of the United States shall be exempt from taxation by or under state or municipal or local authority."[15] Even without any act of congress this rule would apply. On general principles of law, no state could tax the bonds, notes, or certificates of indebtedness of the national government, nor the notes of the national banks.[16] "The authority to borrow money on the credit of the United States is among the enumerated powers expressly vested by the constitution in the national government, and as, within the sphere of those powers, that government has been made supreme, the states cannot, by taxing its notes or other obligations, impair its ability to raise money for necessary governmental purposes."[17] Congress has constitutional power to declare that bonds issued by the District of Columbia, to be paid in part by taxation of property within the District and in part by appropriations from the revenues of the United States, shall be exempt from all taxation by state or

[14] McGoon v. Scales, 9 Wall. 23; Van Brocklin v. Tennessee, 117 U. S. 151, 6 Sup. Ct. 670; Wisconsin Cent. R. Co. v. Price Co., 133 U. S. 496, 10 Sup. Ct. 341; People v. U. S., 93 Ill. 80; Neiswanger v. Gwynne, 13 Ohio, 74; Dixon v. Porter, 23 Miss. 84; Hall v. Dowling, 18 Cal. 619; Quivey v. Lawrence, 1 Idaho, N. S. 313; Wright v. Cradlebaugh, 3 Nev. 342; Doe v. Hearick, 14 Ind. 242; Bonner v. Phillips, 77 Ala. 427; Wisconsin Cent. R. Co. v. Taylor Co., 52 Wis. 37, 8 N. W. 833; People v. Morrison, 22 Cal. 73; Ivinson v. Hance, 1 Wyo. 270.

[15] Rev. St. U. S. § 3701.

[16] Weston v. City Council of Charleston, 2 Pet. 449; Bank Tax Case, 2 Wall. 200; Horne v. Green, 52 Miss. 452; Ogden v. Walker, 59 Ind. 460; Campbell v. City of Centerville, 69 Iowa, 439, 29 N. W. 596; Dixon Co. v. Halstead, 23 Neb. 697, 37 N. W. 621. But where taxable personal property is converted into United States securities for the express purpose of avoiding taxation, a court of equity will not interfere to enjoin the collection of a tax assessed on such securities. Ogden v. Walker, 59 Ind. 460. A state may tax the stocks, bonds, or other certificates of public debt issued by another state, or by its municipal corporations, when the same are owned by residents of the taxing state. Appeal Tax Court of Baltimore City v. Patterson, 50 Md. 354.

[17] Shotwell v. Moore, 45 Ohio St. 632, 16 N. E. 470.

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municipal authority.[18] So again, the capital stock of the national banks is not subject to state taxation, except in so far as congress authorizes it.[19] But the shares of such stock, considered as the property of the individual shareholders, are taxable by the states,[20] provided, however, that such taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national bank owned by nonresidents of any state shall be taxed in the city or town where the bank is located and not elsewhere.[21] A state cannot tax a telegraph company on messages sent over its wires by officers of the United States on the public business.[22] Nor can it tax the exclusive right to make, use, and vend an invention or discovery granted by letters patent of the United States.[23] Nor can state taxation be imposed upon the officers or agents of the general government, in respect to their connection with that government, or the property, means, or agencies employed by them to discharge their official duties.[24]

So, again, "a tax upon persons may possibly, in some cases, tend to embarrass the operations of either the national or state government, in which case it would be void unless imposed by the government which was liable to be inconvenienced by it. And on this ground it has been held that a state tax of a certain sum on every person leaving the state by public conveyance was invalid, the tendency being to embarrass the functions of the national government, by obstructing the travel of citizens and officers of the United States in the business of the government and the transportation of armies and munitions of war." [25]

[18] Grether v. Wright (C. C. A.) 75 Fed. 742.

[19] Tappan v. Bank, 19 Wall. 490; Sumter Co. v. National Bank of Gainesville, 62 Ala. 464.

[20] National Bank v. Com., 9 Wall. 353; City of Utica v. Churchill, 33 N. Y. 161.

[21] Rev. St. U. S. § 5219.

[22] Telegraph Co. v. Texas, 105 U. S. 460.

[23] In re Sheffield, 64 Fed. 833.

[24] A post trader on an Indian reservation is an agent of the government, and the state or territory cannot tax his stock in trade. Fremont Co. v. Moore, 8 Wyo. 200, 19 Pac. 438.

[25] Cooley, Tax'n, 86; Crandall v. Nevada, 6 Wall. 35.

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But the doctrine which exempts the instrumentalities of the federal government from the influence of state legislation not being founded on any express provision of the constitution, but on the implied necessity for the use of such instruments by the federal government, it follows that it must be limited by the principle that state legislation which does not impair the usefulness or capability of such instruments to serve that government is not within the rule of prohibition.[26] Thus, while the states cannot tax a franchise granted to a corporation by a law of the United States [27] (for, if they could, they could lay such onerous and prohibitive taxation on the rights granted as to render them worthless and thus defeat the congressional grant), yet a corporation chartered by the general government, or subsidized by it, is not exempt from state taxation unless it is employed as a means, agency, or instrument for the exercise of the constitutional powers of the United States.[28] Further, the mere fact that a corporation is employed in the service of the United States will not suffice to exempt it from state taxation, as an instrument or agency of the government, when there is no legislation on the part of congress to show that such an exemption is deemed by it essential to the full performance of the company's obligations to the government, and when the corporation derives its existence from state law, and exercises its franchises thereunder, and holds its property within state jurisdiction and under state protection.[29]

The converse of this rule is equally true. That is to say, it is not within the constitutional power of congress to so adjust the revenue system of the United States as to interfere with or defeat the operations of the state governments within the sphere of their legitimate activities.[30] Thus, a municipal corporation, being a portion of the sovereign power of the state, is not subject to taxation by congress

[26] National Bank v. Com., 9 Wall. 353; Railroad Co. v. Peniston, 18 Wall. 5.

[27] San Benito Co. v. Railroad Co., 77 Cal. 518, 19 Pac. 827.

[28] Union Pac. R. Co. v. Lincoln Co., 1 Dill. 314, Fed. Cas. No. 14,378; State v. City of Newark, 39 N. J. Law, 380.

[29] Thomson v. Pacific R. R., 9 Wall. 579; County of Santa Clara v. Southern Pac. R. Co., 18 Fed. 385.

[30] State Treasurer v. Wright, 28 Ill. 509.

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upon its municipal revenues.[31] And it was held that the federal income tax law of 1894, in so far as it levied a tax upon income derived from municipal bonds, was invalid, as being a tax on the power of the states and their municipalities to borrow money.[32] For similar reasons, it is not competent for congress to impose a tax upon the salary of a judicial officer of a state.[33] Nor has congress constitutional power to impose taxation on the process or proceedings of the state courts.[34]

LIMITATIONS IMPOSED BY FEDERAL CONSTITUTION.

159. The power of taxation possessed by the several states is limited, in certain important particulars, by specific provisions of the federal constitution.

(a) No state may, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.

(b) No state may lay any duty of tonnage, unless with the consent of congress.

(c) State taxation may not be so imposed as to amount to an interference with foreign or interstate commerce.

(d) State taxation is invalid if it discriminates against the rights and privileges of citizens of other states.

(e) No state may, by its system of taxation, deny to any person or class of persons the equal protection of the laws.

(f) State taxation must not impair the obligation of contracts.

All of these limitations upon the taxing power of the states (and they are of the highest importance and practical interest) have

[31] U. S. v. Railroad Co., 17 Wall. 322.

[32] Pollock v. Trust Co., 157 U. S. 429, 15 Sup. Ct. 673.

[33] Collector v. Day, 11 Wall. 113; Freedman v. Sigel, 10 Blatchf. 327, Fed. Cas. No. 5,080.

[34] Smith v. Short, 40 Ala. 385.

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been fully considered in other parts of this book, to which the reader is referred. That the prohibition against laws impairing the obligation of contracts may in some cases amount to a check upon the power of taxation inherent in a state, will appear from an examination of the authorities cited in the margin.[35] And a state law imposing taxation which would be repugnant to the stipulations of a treaty made by the United States with a foreign nation would be void, for the treaty is declared by the constitution to be the supreme law of the land, anything in the constitution or laws of the state to the contrary notwithstanding.[36] But the federal constitution does not prohibit a state from taxing her resident citizens for debts held by them against a nonresident, evidenced by his bond and mortgage on land in another state.[37]

LIMITATIONS IMPOSED BY STATE CONSTITUTIONS.

160. The legislature of a state is further circumscribed in the exercise of the sovereign power of taxation, by various limitations found in the state constitution. Whatever these restrictions may be, in the particular state, they must be strictly observed.

161. But an intention to limit the power of taxation will never be presumed; it must be shown to follow from clear and definite provisions of the constitution.

"Great as is the power of the state to tax," says Judge Cooley, "the people may limit its exercise by the legislative authority at pleasure. This, however, can only be done by the constitution of the state. And limitations or restrictions upon the exercise of this essential power of sovereignty can never be raised by implication, but the intention to impose them must be expressed in clear and unambiguous language." [38] In some of the states, the constitution prescribes or limits the amount to be raised by state taxation in any one year. A provision of this sort is self-executing, for any

[35] Murray v. Charleston, 96 U. S. 432; Hartman v. Greenhow, 102 U. S. 672.
[36] Cooley, Tax'n, 100.
[37] Kirtland v. Hotchkiss, 100 U. S. 491.
[38] Cooley, Tax'n, 101.

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taxation in excess of the rate allowed would be merely void and could not be collected by process of law. In several states, the fundamental law requires that every statute imposing a tax shall state distinctly the object of the same, to which only it shall be applied. In some, the constitution declares that poll taxes are oppressive and specifically forbids their imposition. It is scarcely necessary to say that no power resides in the legislature of any state to override provisions of this description, imposed as limitations upon its authority by the people themselves in framing their constitution.

Furthermore, it is a general principle that the taxing powers of a state are limited to persons and property within and subject to its jurisdiction. Hence it is entirely incompetent for one state to tax real property which lies within the boundaries of another, and if an attempt at such taxation is made, the right to tax the land in the latter state will not be affected thereby.[39] For a similar reason, the taxing power of a state does not extend to intangible personal property owned by a non-resident of the state. Thus, where a person residing in the state of New York owned stock representing the debt of the city of Baltimore, it was held that such stock was not taxable by the state of Maryland.[40]

It is also within the power of the legislature (as will more fully appear in another chapter) to bind the state, by contract founded on a consideration, to exempt particular property from taxation, either for a limited period or indefinitely. And when this has been done, the contract so established imposes a limitation upon the taxing power of the state. For any attempt to impose taxes on property so exempted would be a violation of the obligation of the contract, and therefore unconstitutional.

PURPOSES OF TAXATION.

162. One invariable limitation upon the power of taxation is that it must always be exercised for the benefit of the public, never for the advantage of individuals.

[39] Winnipiseogee Lake Cotton & Woolen Manuf'g Co. v. Gilford, 64 N. H. 337, 10 Atl. 849.

[40] Mayor, etc., of Baltimore v. Hussey, 67 Md. 112, 9 Atl. 19; Case of State Tax on Foreign-Held Bonds, 15 Wall. 317.

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163. Whether or not a particular purpose of taxation is a "public" purpose, is a question which must be determined, in the first instance, by the legislature. But its determination is not conclusive. And if the courts can see that the purpose of the tax is plainly and indubitably a private purpose, they will not allow its collection.

That the purposes for which the power of taxation may be employed must be public purposes is a necessary deduction from the definition of taxation. It does not consist in the power to take the money or property of the citizens generally. But it is the power to raise funds, by enforced proportional contributions, for the support of government and for the means of carrying into effect the objects for which government is established. This being the case, it is not even important to inquire whether the constitution of the particular state expressly forbids taxation for other than public purposes. Even the most unlimited grant of power to a legislature could not justify confiscation of private property under the pretense of taxation. The limitation will always exist by necessary implication. As is said by the courts, the general grant of legislative power in the constitution of a state does not authorize the legislature, in the exercise either of the right of eminent domain or of the power of taxation, to take private property, without the owner's consent, for any but a public object.[41]

But the question, what purposes are to be considered "public," within the meaning of this limitation, is one which gives rise to many controversies and not a little confusion in the authorities. A few general rules may be laid down, which will suffice to show the lines on which the inquiry must be conducted, and the tests usually applied to determine the question.

In the first place, in order that an object of taxation should be public, it is necessary that it should be for the benefit and advantage of the whole people. But it is not necessary to show that a direct and pecuniary benefit will accrue to each person to be affected by the tax. All citizens are interested in the general welfare of the state. Whatever promotes the prosperity of the whole

[41] Cole v. La Grange, 113 U. S. 1, 5 Sup. Ct. 416.

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community makes for the advantage of each. All persons are vitally concerned in the peace, order, and good government of the country in which they live.[42] In the next place, although the proximate object of the tax may be the benefit or advantage of an individual, it does not always follow that the general object may not be the public welfare. For the object in conferring this benefit upon an individual may be intimately connected with the advantage of the whole people. For example, when the government assumes to make grants of land or money as bounties, or to pay pensions to retired or disabled officers, civil or military, it is true that the persons to receive the gift are most directly concerned. But the grant is made upon consideration of public services rendered or to be rendered, and is calculated and intended to promote the efficiency and fidelity of the public service by extending the hope of a reward in certain contingencies. The only question as to such laws is therefore one of wisdom and expediency; it is a political question, not a legal question.[43] In the next place, a "public purpose" invariably means a purpose which concerns the aggregate of the people within the jurisdiction of the government which authorizes the assessment. For example, the construction of a system of sewers, or parks, or waterworks, in a city, is a public purpose, so far as concerns the residents of the city, and therefore a legitimate object of municipal taxation. But it is not a public purpose as regards the people of the state at large. Hence the tax area must be restricted to the district to be benefited. Taxation of the whole state for such a purpose would be clearly inadmissible. And conversely, there may be a public purpose which would serve as a basis for state taxation, but would not uphold the taxation which its municipal corporations might lawfully vote and collect. And so again, a tax cannot be imposed exclusively on any subdivision of the state to pay an indebtedness or claim which is not peculiarly the debt of such subdivision, or to raise money for any purpose not peculiarly for the benefit of such subdivision. In other words, if the tax be laid upon one of the municipal subdivisions of the state alone, the purpose must not only

[42] New York, L. E. & W. R. Co. v. Commissioners, 48 Ohio St. 249, 27 N. E. 548.

[43] Cooley, Tax'n, 111.

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be public, as regards the people of that municipality, but also local.[44]

We have said that the determination of the question whether or not a particular object is a public purpose, so as to justify taxation, belongs in the first instance to the legislature. This means that the legislature must judge of the public nature of the proposed expenditure; that their determination is presumed to be correct; that it will in any case be sufficient to authorize the persons charged with the levy and collection of the tax in proceeding with their duties; that when the question is presented to the courts they will decide it as one of law, giving to the legislative action every presumption of regularity and validity, and refusing to hold the legislative body down to any narrow or technical rule, and not interfering unless the violation of the principle involved is clear and unquestionable. "To justify the court in arresting the proceedings, and in declaring the tax void, the absence of all possible public interest in the purposes for which the funds are raised must be clear and palpable, so clear and palpable as to be perceptible by every mind at the first blush."[45] But if the courts can perceive, on the face of the tax law, that the purpose is a private purpose and not one which would justify the imposition of taxes, then they will give relief to any person aggrieved who brings his case properly before them. This may be done, in some cases, by enjoining the collection of the tax; in others, by allowing the recovery of taxes paid under protest, or damages for the seizure of property in pursuance of its authority.

Among the many and varied purposes for which money is usually raised by taxation, there are some which are unquestionably "public" in every proper sense of the term. And there are others, in regard to which it is not always clear whether they are so far public as to constitute a legitimate basis for taxation. We shall proceed to consider some of these cases briefly. The preservation

[44] Sanborn v. Commissioners of Rice Co., 9 Minn. 273 (Gil. 258); McBean v. Chandler, 9 Heisk. 349; Wells v. City of Weston, 22 Mo. 384; Livingston Co. v. Welder, 64 Ill. 427.

[45] Booth v. Town of Woodbury, 32 Conn. 118; Walker v. City of Cincinnati, 21 Ohio St. 14; Stockton & V. R. Co. v. City of Stockton, 41 Cal. 147, 173; Weismer v. Village of Douglas, 64 N. Y. 91; Sharpless v. Mayor, 21 Pa. St. 147; English v. Oliver, 28 Ark. 317.

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of the public peace and the good order of the community; provision for the due and efficient administration of justice, the enforcement of civil rights, and the punishment and prevention of crime; provision for the compensation of public officers; for erecting, maintaining, repairing, and protecting the public buildings and public property in general; paying the expenses of legislation and of administering the laws; establishing and maintaining free public schools and other public institutions of learning; public charities, including the relief of paupers, the care of the indigent sick, blind, or insane, and the maintenance of public asylums, hospitals, and work-houses; the construction, repair, and improvement of public roads, including highways, turnpikes, and paved streets in cities; the enforcement of sanitary regulations, designed to protect or promote the public health; the maintenance of public parks or pleasure grounds in the cities; the payment of such public debts as were lawfully and constitutionally contracted; the enforcement or discharge of certain public obligations which, though not legally a liability of the state or municipality, are of clear moral obligation, —all these are plainly and admittedly "public" purposes, and proper to be provided for by general taxation.

But when we pass from those objects which are properly the care and duty of the government, or which are calculated to benefit the entire community, to those which work a benefit only to private persons, we cross the line and enter upon the region of unlawful exactions. For example, though it was at one time doubted whether municipal corporations could legally donate money or issue their obligations in aid of the construction of railroads, the great preponderance of authority, at present, is in favor of the constitutionality of stock subscriptions by municipalities in aid of such roads, when duly authorized by the legislature, and of taxation by them for the payment of their bonds given to the railroad companies. These roads are regarded as improved modern highways, and although they are owned by private corporations, they are of direct benefit to the entire people of the districts through which they pass.[46] But on the other hand, it is well settled that municipal

[46] Gilman v. City of Sheboygan, 2 Black (U. S.) 510; Augusta Bank v. Augusta, 49 Me. 507; Walker v. Cincinnati, 21 Ohio St. 14; Stockton & V. R. Co. v. City of Stockton, 41 Cal. 147. Compare People v. Township Board of Salem, 20 Mich. 452.

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corporations, with or without the sanction of legislative authority, have no legal power to donate money, lend their credit, or issue their obligations, to aid in the erection or conduct of manufactories or other business enterprises owned and controlled by private persons, or as a means of securing the location of such enterprises in the particular community; taxation for such purposes is not legitimate, and such obligations, if issued, are void.[47] Again, it is admittedly proper for the state, or its municipalities, to undertake the work of draining and reclaiming marsh and swamp lands, for the purpose of abating the nuisance which such places create, and thereby promoting the public health, and the construction of levees, embankments, and ditches, and in furtherance of these objects the power of taxation may be employed.[48] But all such works must be public in their nature, that is, they must be for the benefit of the whole population of the district taxed, or else the raising of money by taxation cannot be justified. Thus, a tax to construct a drain, on private property, in which the public are not concerned, or of a dam which at discretion is to be devoted to private purposes, is invalid.[49] So again, while it is not denied that the establishment of free public schools, for the instruction of children of citizens in the elementary branches of secular learning, is a proper object of taxation, yet it is generally conceded that religious instruction does not stand on the same basis, and cannot be provided for by the application of public money.[50] In further illustration of this difference, it may be noticed that while public parks, since they contribute so largely to the public welfare in a variety of ways,

[47] Parkersburg v. Brown, 106 U. S. 487, 1 Sup. Ct. 442; Citizens' Sav. & Loan Ass'n v. Topeka, 20 Wall. 655; Allen v. Inhabitants of Jay, 60 Me. 124; Brewer Brick Co. v. Brewer, 62 Me. 62. Bonds of a county issued to aid a company in improving the water power of a river for the purpose of propelling public grist mills, are issued to aid in constructing a "work of internal improvement," for which taxation is lawful. Blair v. Cuming Co., 111 U. S. 363, 4 Sup. Ct. 44; Burlington Tp. v. Beasly, 94 U. S. 310. Compare Osborne v. County of Adams, 106 U. S. 181, 1 Sup. Ct. 168.

[48] Dingley v. Boston, 100 Mass. 544; Tide-Water Co. v. Coster, 18 N. J. Eq. 518; Egyptian Levee Co. v. Hardin, 27 Mo. 495.

[49] People v. Board of Sup'rs of Saginaw Co., 26 Mich. 22; Attorney General v. Eau Claire, 37 Wis. 400.

[50] Cooley, Tax'n, 118.

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especially in the large cities, are proper objects for the expenditure of public funds, yet it is no part of the office of government to provide amusements for the people. Thus, it is held that a city has no authority to furnish an entertainment for the citizens and guests of the city, on a public holiday, at the public expense.[51]

EQUALITY AND UNIFORMITY IN TAXATION.

164. In many of the states, in pursuance of a general rule of justice and sound public policy, the constitutions provide that taxation shall be equal and uniform throughout the state, or throughout each municipality levying a tax.

165. This provision is intended as a guide and standard for the action of the legislature, but cannot be made a test of the validity of a tax law, in the courts, unless in cases of a very gross and palpable violation of its injunctions.

That taxation should be equal is not only a maxim of constitutional law, but also a fundamental principle of sound political economy. That the public revenues should not be raised by unjust and discriminating impositions upon a few, but that all the citizens should be called upon to contribute to the support of government as nearly as possible in proportion to their respective abilities, or in proportion to the property which they enjoy under the protection of the government, is an obvious requirement of justice. In theory, taxation should fall equally and uniformly upon all, and be levied with perfect justice. But in practice, such a result is not attainable. No tax law has ever been devised which did not involve some measure of inequality or some lack of uniformity. "Perfect equality in the assessment of taxes is unattainable. Approximation to it is all that can be had. Under any system of taxation, however wisely and carefully framed, a disproportionate share of the public burdens will be thrown on certain kinds of property, because they are visible and tangible, while others are

[51] Hodges v. City of Buffalo, 2 Denio (N. Y.) 110.

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of a nature to elude vigilance." [52] It rests within the exclusive power and jurisdiction of the legislature to decide, subject only to the limitations of the constitution, for what purposes revenue shall be raised by taxation, and at what times and in what manner. And it must also select the objects for taxation. In all these matters, the legislative discretion is conclusive, and it belongs to no other branch of the government to question it or set it aside.[53] And it follows that the courts have no power, on the application of an individual, to declare a tax illegal and void, merely because it is made to appear that some other method of levying the contribution, or apportioning the individual shares of the public burden, would probably or certainly have secured a more exact justice and equality. But still, when the particular case is on its face so palpably oppressive and unequal as to furnish conclusive evidence that equality was not sought for but avoided, and that confiscation, instead of lawful taxation, was designed, then it is the right and duty of the judiciary to declare that the legislative body has overstepped the limits of its legal discretion.[54]

In practice, therefore, "equality" in taxation means that, as nearly as may be practicable, all the citizens should be called upon to pay taxes, which taxes shall be strictly proportioned to the relative value of their taxable property. And "uniformity" in taxation means that all taxable articles, or kinds of property, of the same class, shall be taxed at the same rate. It does not mean that lands, chattels, securities, incomes, occupations, franchises, privileges, necessities, and luxuries, shall all be assessed at the same rate. Different articles may be taxed at different amounts, provided the rate is uniform on the same class everywhere, with all people, and at all times.[55] Hence this constitutional requirement does not prevent the legislature from arranging the different subjects of taxation in distinct classes and making discriminations in the rate of tax imposed upon the several classes, if it be done in pursuance of a fair and reasonable system. For example, a statute imposing a tax on debts,

[52] Com. v. People's Five Cents Sav. Bank, 5 Allen (Mass.) 428, 436.

[53] Mayor, etc., of Athens v. Long, 54 Ga. 330.

[54] Com. v. People's Five Cents Sav. Bank, 5 Allen (Mass.) 436; Dundee Mortg. Trust Inv. Co. v. School Dist., 19 Fed. 359.

[55] Miller, Const. 241.

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to be assessed on the actual value of debts owing from individuals, and on the nominal value of debts owing from private corporations, is not unconstitutional, since it makes corporate debts the subject of a distinct class for purposes of taxation, which the legislature has power to do.[56] And when a principle of classification is thus adopted, the interference of the judicial department will not be justified, unless the classification adopted should be based upon an invidious and unreasonable distinction or difference with reference to similar kinds of property, or unless there should be discovered a lack of uniformity within the limits of the same class.[57]

Special assessments for local improvements, although they are subject to the rule of equality and uniformity in respect to the property on which they are levied, are not taxes, within the meaning of the constitutional and statutory provisions on the general subject of taxation. "The legislature, in the exercise of its power of taxation, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading, or repairing of a street, to be assessed upon the owners of lands benefited thereby; and the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion."[58] But the constitutional principle under consideration requires that, when the class of persons who are to bear the expense is once ascertained, the assessment shall be made among them, not arbitrarily, but according to the relative value of their property to be benefited by the improvement.[59]

The rule of equality and uniformity may be said generally to demand that all persons who are liable, or all property which is liable, to taxation should be called upon to bear a share of the public burdens. Yet the exemption of persons or property from taxation will not invariably or necessarily violate this rule. Especially is this the case where the exemptions were made by reason of a public benefit or other adequate consideration moving to the state from the parties exempted. And the general principle is not to be taken

[56] Com. v. Lehigh Val. R. Co., 129 Pa. St. 429, 18 Atl. 406, 410.

[57] Singer Manuf'g Co. v. Wright, 33 Fed. 121; People v. Henderson, 12 Colo. 369, 21 Pac. 144.

[58] Spencer v. Merchant, 125 U. S. 345, 8 Sup. Ct. 921.

[59] Taylor v. Palmer, 31 Cal. 240.

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so strictly as to deny the validity of the exemptions usually made for special reasons of public policy, such, for example, as the mechanic's tools, household furniture to a limited extent, the property of the very poor, and the property of religious, educational, and charitable associations. Commutation of taxes is not in general either unconstitutional or productive of inequality or a want of uniformity. For example, where a tax is levied in labor or anything else than money, and the privilege is extended to the tax payer of commuting the tax by the payment of an equivalent in money, such a provision is valid and legal, provided the privilege is offered to all who are called upon to pay the tax, without partiality or exception.[60] So it is within the power of the legislature to enact that a railroad company shall have immunity from state and county taxation upon a quarterly payment of a certain amount in commutation, the right being reserved on the part of the state to annul the agreement at any time.[61]

A just objection to a system involving double taxation would appear to follow as a corollary from the rule requiring equality and uniformity. But this must be taken with important restrictions. It not infrequently happens that personal property will be subject to duplicate taxation. A system of indirect taxes combined with a system of general taxation by value will usually produce this result; as where corporate stock is taxed and also the corporation itself, or where the purchaser of property on credit is taxed for its value and the vendor on the debt. Now while these results are apparently opposed to the rule of equality, the courts unite in holding that taxation is not, for this reason alone, invalid.[62] Nevertheless, there are certain cases where the duplication of the public burden would be so palpably unfair and partial as to be clearly incompatible with any constitution which prescribes equality and uniformity as the general rule for tax legislation. Such is the case where one person is called upon to pay two assessments upon the same property while his neighbor pays but one, e. g., where a merchant's stock in trade is taxed as such, and also, by value, as a part

[60] Cooper v. Ash, 76 Ill. 11.

[61] Neary v. Railroad Co., 7 Houst. 419, 9 Atl. 405.

[62] Augusta Bank v. Augusta, 36 Me. 255, 259.

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of his general estate.[63] And the presumption is always against double taxation, and a law will not be so construed as to produce this result, unless it is required by the plain and unambiguous terms of the act, or by necessary implication from its language.

TAXATION AND REPRESENTATION.

166. It is a fundamental maxim of republican government that taxation and representation should go together. But this means that the local legislature should make the local laws, including tax laws. It does not mean that a tax law is invalid unless every person who is liable to pay a part of the tax had a vote in the election of the legislative body which imposed it.

"This principle," says Cooley, "has sometimes been appealed to as if it meant that no person could be taxed unless in the body which voted the tax he was represented by some one in whose selection he had a voice; but it never had any such meaning and never could have, without excluding from taxation a very large proportion of all the property of the state. If the privilege of voting for representatives in the government were the only or even the principal benefit received from government, there might be the highest reason in exempting the non-voting infant or alien from taxation; but this privilege to any particular individual, as compared with the protection of life, liberty, and property, is really insignificant. And so long as all persons cannot participate in government the limits of exclusion and admission must always be determined on considerations of general public policy."[64] It is held by the courts, therefore, and notwithstanding the maxim in question, that the property of persons who have not the right to vote may be taxed, if the legislature shall so determine.[65] And a peculiarly apposite illustration of this is found in the District of Columbia, where the citizens have no right of suffrage and where, nevertheless, congress has the right to impose taxes upon all property owners.[66] At the same time, it is undoubtedly the rule

[63] Cooley, Tax'n, 225.
[64] Cooley, Tax'n, 58.
[65] Wheeler v. Wall, 6 Allen (Mass.) 558; Smith v. Macon, 20 Ark. 17.
[66] Loughborough v. Blake, 5 Wheat. 317.

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that tax laws are to be construed, if possible, so as not to impose taxes without the consent of the people taxed, or of their immediate representatives.[87]

TAXATION UNDER THE POLICE POWER.

167. Beside the general power of taxation, the state has power to impose burdens, in the nature of taxes, upon special occupations or special kinds of property, with a view rather to regulation than to revenue, under the power of police.

"There are some cases in which levies are made and collected under the general designation of taxes, or under some term employed in revenue laws to indicate a particular class of taxes, where the imposition of the burden may fairly be referred to some other authority than to that branch of the sovereign power of the state under which the public revenues are apportioned and collected. The reason is, that the imposition has not for its object the raising of revenue, but looks rather to the regulation of relative rights, privileges, and duties as between individuals, to the conservation of order in the political society, to the encouragement of industry, and the discouragement of pernicious employments. Legislation for these purposes it would seem proper to look upon as being made in the exercise of that authority which is inherent in every sovereignty, to make all such rules and regulations as are needful to secure and preserve the public order and to protect each individual in the enjoyment of his own rights and privileges by requiring the observance of rules of order, fairness, and good neighborhood, by all around him. This manifestation of the sovereign authority is usually spoken of as the police power." [88] Examples of this kind of assessments are to be seen in the usual license fees for pursuing certain occupations which have an intimate relation to the public health or morals, such as the occupation of a retail liquor seller, and also in assessments for the construction or repair of sewers, sidewalks, levees, drains, and other such works.[89]

[87] Keasy v. Bricker, 60 Pa. St. 9. [88] Cooley, Tax'n, 586.
[89] Youngblood v. Sexton, 32 Mich. 406.

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CHAPTER XVI.

THE RIGHT OF EMINENT DOMAIN.

168. Definition and Nature of the Power.
169. Constitutional Provisions.
170. By Whom the Power is Exercised.
171–172. Legislative Authority Necessary.
173–175. The Purpose must be Public.
176. What Property may be Taken.
177. Appropriation to New Uses.
178. The Taking.
179. Consequential Injuries.
180. Compensation.

DEFINITION AND NATURE OF THE POWER.

168. The right of eminent domain is the right of the nation or the state, or of those to whom the power has been lawfully delegated, to condemn private property to public use, and to appropriate the ownership and possession of such property for such use, upon paying to the owner a due compensation, to be ascertained according to law.

There has been a certain ambiguity in the use of the term "eminent domain" in consequence of a confusion between the power and jurisdiction which the state exercises over the public property, and the right and power of the state to assume the ownership of that which before was private property. There is a lawful authority in every sovereignty to control and regulate those rights of a public nature which pertain to its citizens in common. For example, in regard to the public waters of the state, it is the prerogative of the state to define and regulate the right of fishing in such waters. So also, unless grants to private persons interfere, the state is the owner of the tide-lands, or sea-shore, along its water front, and it may regulate the use of such lands, to the limits of its territorial jurisdiction, by prescribing the terms and conditions on which

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wharves, piers, and other structures may be maintained.[1] So again, the state is the paramount owner of the public parks, reservations, the state buildings, and other such public property. But it is not an accurate use of language to apply the term "eminent domain" to such property as is owned directly by the government and which has not yet passed into any private ownership. Such property is more correctly described as the "national domain" or the "public domain," as the case may be, and the power of the nation or of the state over it is best designated as "territorial sovereignty." The word "eminent," in this connection, implies a power or title which is paramount to some other power or title. It implies that the land is held in private ownership, but that there exists in the state a higher claim, namely, the right to divest that ownership and vest the title in the state, when the public exigencies demand it, and upon making just compensation. The right of eminent domain is therefore a survival of the common-law notion that the ultimate title to all lands was vested in the sovereign. It is true that in this country all tenures are now allodial. And the eminent domain does not give to the state a title to private land in any sense which would interfere with the free disposition of it at the owner's pleasure. But as all lands are supposed to be held, mediately or immediately, from the state, this power implies the right of the state, on given conditions, to resume the title supposed to have been granted by it. These conditions are, first, that it shall be for a public purpose, and, second, that just compensation shall be made. It will thus be perceived that the true idea of the power of eminent domain is that it is a right in the government, acting in the interest of the whole public, to force the owner of property to sell the same to the public, from whom his title originally came, and subject to whose needs it is always held. It also follows that this power is an inherent and necessary power of sovereignty, and is not created by the constitutions. In fact, the constitutions merely recognize its existence and then proceed to guard the citizen against its arbitrary or unjust exercise, by providing that it may not be wielded except for the benefit of the public and that compensation shall not be withheld.

[1] Webber v. Harbor Commissioners, 18 Wall. 57; Pollard v. Hagan, 3 How. 212.

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The power of eminent domain, being an inherent attribute of sovereignty and a necessary power of the state, the preservation of which, unimpaired and unfettered, is essential to the growth and welfare of the community, is inalienable. That is to say, no legislature can have power, by any grant or contract, to surrender or bargain away the power of eminent domain so as to bind the state, in the future, to refrain from its exercise when a proper and necessary occasion shall arise.[2]

That this power is to be distinguished from the power of taxation has been explained in the chapter dealing with the latter power. In paying taxes, the citizen contributes his just and ascertained share to the expenses of the government under which he lives. But when his property is taken under the power of eminent domain, he is compelled to surrender to the public something over and above his due proportion, for the public benefit, and for which he receives a direct pecuniary compensation. This power is also to be distinguished from the power to regulate the use of private property, to the end that such use shall not be detrimental to the public safety, health, or morals. Regulation of this kind and for this purpose is justified as an exercise of the police power, but it does not amount to an expropriation of the property or a divesting of the title.

The constitutional prohibition against depriving any person of his property "without due process of law" may also have some relation to the exercise of the power of eminent domain, at least so far as to require legal and orderly proceedings for its exercise, and perhaps to render necessary a judicial hearing on the question of damages. But in general, these matters are adequately provided for by the guaranties of just compensation and jury trial which accompany the constitutional recognition of the power.

CONSTITUTIONAL PROVISIONS.

169. In the fifth amendment to the federal constitution it is declared that private property shall not be taken for public use without just compensation. And the constitutions of all the states contain similar guaranties against

[2] Hyde Park v. Oakwoods Cemetery Ass'n, 119 Ill. 141, 7 N. E. 627.

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the arbitrary or unrecompensed expropriation of private property.

The provisions of the fifth amendment were intended only as a limitation upon the powers of the general government, and do not affect the several states. But all the states have been careful to incorporate in their constitutions such provisions as would suffice to extend a similar protection to private property against the exertion of their own sovereign powers. In some of the states, the guaranty is in the same words as are employed in the federal constitution. In others, it is somewhat more comprehensive, declaring that no man's property shall be taken, damaged, or destroyed for public use without just compensation being made. In many of the states, the compensation for property so taken must be determined by a jury, and in the same and some other states, the compensation must be paid to the private owner before the taking.

BY WHOM THE POWER IS EXERCISED.

170. The power of eminent domain, being an attribute of sovereignty, belongs primarily to every government as such. It is vested in—

(a) The government of the United States, so far as may be necessary for the proper performance of its duties and functions.

(b) The government of each of the states.

(c) Municipal corporations, when delegated to them by the legislature for their appropriate purposes.

d) Private corporations which discharge a public duty or are designed to promote the public convenience, under a similar delegation.

The United States.

Within its own sphere, and with reference to its own constitutional duties and functions, the government of the United States is sovereign, and therefore must possess the power of eminent domain, as well as all other sovereign powers. Whenever it may be necessary to appropriate private property for the carrying on of any of the proper undertakings or offices of the general govern-

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ment, that government may exercise its power of eminent domain, as well within the limits of a state as in the districts subject to its exclusive jurisdiction, and the consent or co-operation of the state is not required.[8] For instance, the federal authorities may proceed directly, by their own officers and courts, and without the intervention of the state, to condemn and appropriate private property, anywhere situated, for post-offices, court-houses, forts, arsenals, light-houses, or military roads.

Municipal Corporations.

It is entirely proper, and in accordance with the principles of the constitution, that municipal corporations should be authorized to exercise the power of eminent domain for the benefit of their own restricted "public," and in furtherance of the objects for which a share of government is committed to them. In the exercise of this power, just as in the case of taxation, a use may be local and yet public. That is, it may be public, in a proper sense, although it does not directly concern the entire population of the state, if it does concern the entire population of a district or division of the state. Hence cities, towns, counties, school districts, and other municipal corporations may be authorized to appropriate private property for such uses as streets, parks, public buildings, school houses, water works, and the like.

Private Corporations.

Moreover, the right to exercise this power may be delegated by the legislature to private corporations which, although their business is pursued for purposes of gain, yet stand in such a relation to the public that they may be considered as promoting the public convenience, or discharging a public office or duty, or carrying on works which are of general public utility. Such are railroad companies, bridge and turnpike corporations, and irrigation companies.

LEGISLATIVE AUTHORITY NECESSARY.

171. The power of eminent domain can be exercised only in pursuance of legislative authority, and on the occasions and in the modes designated by the legislature.

[8] Kohl v. U. S., 91 U. S. 367; Darlington v. U. S., 82 Pa. St. 382; Trombley v. Humphrey, 23 Mich. 471.

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172. Statutes authorizing the exercise of this power will be strictly construed, and those charged with the execution of the power will be held to a strict compliance with all the conditions and requirements of the statute.

The power of eminent domain is indeed inherent in the sovereignty, but it remains formless and inactive until it is called into operation and directed to its object by the legislative power of the state. It is for the legislature to prescribe the occasions for its exercise, as also the conditions upon which the power may be resorted to, and the methods and instrumentalities by which its application to the property of individuals shall be compassed. It is also for the state, by its legislative body, to determine when the exigency arises which will justify calling this power into exercise. And it may likewise determine the specific objects to which it shall be directed. That is, the legislature may decide what parcels of land, or other property, shall be taken for a given public use, and the owner has no constitutional right to demand a hearing and an opportunity to contest the necessity of the particular appropriation which affects his interests. In practice, however, the determination of this question is usually referred to commissioners, before whom all the parties in interest have a right to appear and be heard, or to a jury.[4]

Since the exercise of the power of eminent domain is in derogation of common right, and is a high exertion of the paramount rights of the sovereign, it must be hedged about with all needful precautions for the protection and security of the citizen. And for this reason it is held that statutes authorizing the appropriation of pri-

[4] The question of the necessity of the appropriation (whether or not particular property shall be taken), aside from the question of the amount of compensation to be made, is not one which must be determined by a jury, or in the forms of judicial proceedings, unless the constitution of the state specifically so provides. No constitutional right of trial by jury can be here claimed, unless explicitly given. "The appropriation of the property is an act of public administration, and the form and manner of its performance are such as the legislature in its discretion may prescribe." People v. Smith, 21 N. Y. 595. See U. S. v. Harris, 1 Sumn. 21, Fed. Cas. No. 15,315. But if the constitution provides that the question of appropriation shall be submitted to a jury, the requirement is mandatory. Arnold v. Decatur, 29 Mich. 77.

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vate property for public use must be strictly construed. An intention to authorize such taking will never be presumed, nor deduced from anything but clear and unambiguous terms. Especially is this the case with regard to the delegation of this power to private corporations. Such a corporation will never be presumed to be invested with the power. If it claims the right to condemn property for its uses, it must show a grant of such power.[5] Nor will a grant of the power be enlarged by mere implication. Thus, if the charter of a corporation gives it the right to appropriate private property for certain enumerated purposes, it will possess no authority to take land for any other purposes, and no such extension of its powers can be deduced by mere inference from the terms of the grant.[6] Furthermore, the laws authorizing the exercise of this power must be exactly complied with, in respect to all the forms, conditions, and provisions made for the benefit and protection of the individual, before his property can lawfully be taken.

THE PURPOSE MUST BE PUBLIC.

173. The purpose for which the power of eminent domain is to be exercised must be public, and not merely for the benefit of a private person.

174. The question whether or not the purpose is a public one is a judicial question, upon which the determination of the legislature is not conclusive.

175. The purpose may be local (that is, confined to a municipal subdivision of the state), provided it is public with reference to the people inhabiting the district to be affected.

The Purpose to be Public.

The power of eminent domain, like that of taxation, cannot be exercised by the state for the benefit of one or more particular individuals. There is no power in any state government to take the property of one man and give it to another, or to compel one man

[5] Phillips v. Dunkirk R. Co., 78 Pa. St. 177; Allen v. Jones, 47 Ind. 438.
[6] Currier v. Marietta & C. R. Co., 11 Ohio St. 228.

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to sell his property to another, or to authorize one person to appropriate the property of another, even though compensation be made. But the purpose for which this power is exercised will be considered public if it actually concerns or promotes the welfare, comfort, or convenience of the whole people, notwithstanding one or more individuals may be peculiarly and directly benefited. It is also a limitation upon the exercise of this power that the purpose must be within the legitimate sphere of the government exercising the power.

A Judicial Question.

The mere fact that the legislature, in a statute, declares that a given use is a public use, and authorizes the taking of private property for it, does not necessarily make the use public, nor render lawful the appropriation of private property for it. It is well settled that, if in fact the use is public, the decision of the legislature that the public needs require the taking of private property to promote the use is final and conclusive. But the question, whether or not a given use is a public use, is a judicial question, and this must be determined by the courts, on the application of the person or persons to be affected.

Local Public Uses.

The local nature of the proposed work will not necessarily deprive it of the character of publicity. That is to say, it may pertain only to a district or subdivision of the state, and yet be public as regards all the citizens of that portion of the state. In this regard, the municipal corporation is only a miniature state. The people of the state at large may have no direct interest in the building of a courthouse or a jail in a city, or in the improvement of its streets, or the construction of its bridges, wharves, docks, and markets. But these purposes are all public with reference to the sphere of their utility, and therefore proper subjects for the exercise of the power of eminent domain.

Enumeration of Purposes in State Constitutions.

The constitutions of several of the states undertake, with more or less exhaustiveness, to enumerate the purposes for which the right of eminent domain may be exercised. The following are among the cases specified in one or more of the state constitutions: Public

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buildings and grounds; roads, streets, and alleys in municipalities; water works, aqueducts, drains, and sewers in counties, cities, and towns; raising the banks of streams; removing obstructions therefrom, widening, deepening, or straightening their channels; railways; turnpike or toll roads; canals; irrigation ditches or aqueducts; wharves; docks; piers; bridges; chutes and booms; ferries; telegraph and telephone lines; cemeteries; oil pipe lines.[7] In regard to the most of the foregoing, it may be remarked that, even in the absence of constitutional authorization, they would be regarded as public purposes in a sense which would justify the exercise of the power of eminent domain.

Illustrations of Public Purposes.

Railroad companies, carrying on the general business of common carriers of passengers and freight, unquestionably serve a public use in such sense as to justify the delegation to them of the right of eminent domain for their necessary purposes. But, on the other hand, a railroad which is constructed for the sole purpose of carrying coal from the mines of a private corporation to a convenient point of shipment does not serve a public purpose, so as to justify the exercise of the eminent domain in its behalf.[8] The construction of a ditch, for the purpose of preserving a highway by diverting the waters of a river,[9] or for the purpose of reclaiming marshy lands, in a county, is a public purpose.[10] Again, land taken in a city for public parks and squares, advantageous to the public for recreation, health, or business, is taken for a public use, and the power of eminent domain extends thereto.[11] So, also, lands may be taken for a cemetery, when the general public

[7] See Stim. Am. St. Law, § 1141; Hooper v. Inhabitants of Bridgewater, 102 Mass. 512.

[8] People v. Pittsburgh R. Co., 53 Cal. 694; Sholl v. Coal Co., 118 Ill. 427, 10 N. E. 199. And, in general, a statute authorizing the establishment of a private road across lands of third persons is unconstitutional, as taking private property for a private use. Sadler v. Langham, 34 Ala. 311. Compare Sherman v. Buick, 32 Cal. 242.

[9] Smith v. Gould, 61 Wis. 31, 20 N. W. 369; Patterson v. Baumer, 43 Iowa, 477.

[10] Zimmerman v. Canfield, 42 Ohio St. 468.

[11] Shoemaker v. U. S., 147 U. S. 282, 13 Sup. Ct. 361; In re Commissioners of Central Park, 50 N. Y. 493.

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has the right, or may purchase the right, to bury the dead therein.[12] And the appropriation of watercourses, to the detriment of the rights of riparian proprietors, but for the purpose of supplying farming neighborhoods with water for irrigation, is always and unquestionably a public purpose.[13]

It should also be noted that the public nature of a particular enterprise, for which this power is invoked, may depend upon the degree of development which the state or community has reached at the particular time, or upon the nature and needs of its leading industries. A use which would be a public use in a new and sparsely-settled region would not necessarily be such in a state of society where population was dense and industrial development complex. Again, an industry which, in one state, engages the labor of a large part of the inhabitants, and is of prime importance to the general prosperity of all, may, in another state, be of such relative insignificance and pursued by so few of the people that to aid it by the exercise of the power of eminent domain would be merely serving the private interests of a small number of citizens. Thus, it is said that "mills for the sawing of lumber for purposes of building, grinding grain for food, and the manufacture of material for clothing, may be of such necessity to a community, especially in the early settlement of a country, as to make their establishment a provision for a public service." [14] So, in those states where lumbering is one of the extensive industries, it is held that the construction of booms and dams in the rivers, for the purpose of taking and securing logs and other timber, is a public purpose for which the power of eminent domain may rightfully be exercised.[15] And in several of the states it is considered that the development of the mineral resources of the state is of such importance and public benefit that mining companies may be authorized to exercise the power of eminent domain, by taking lands for their necessary uses, or by condemning a right of way over private property for the carriage of water necessarily used in their mining operations.[16]

[12] Evergreen Cemetery Ass'n v. Beecher, 53 Conn. 551, 5 Atl. 353.

[13] Lux v. Haggin, 69 Cal. 255, 10 Pac. 674.

[14] Lowell v. City of Boston, 111 Mass. 454, 464.

[15] Lancaster v. Driving Co., 62 Me. 272.

[16] Hand Gold Min. Co. v. Parker, 59 Ga. 419; Overman Silver Min. Co. v. Corcoran, 15 Nev. 147.

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WHAT PROPERTY MAY BE TAKEN.

176. The property which may be taken for public use under the power of eminent domain includes everything which is the subject of private ownership, recognized by the law, and in the enjoyment of which the possessor is entitled to the protection of the law. It includes—

(a) Real estate of private owners, whether held in fee or by an estate less than the fee.

(b) Real property belonging to the state or to the United States (subject to certain restrictions.)

(c) Franchises and other incorporeal rights of property.

(d) Easements in realty and the right of possession and enjoyment of the same.

(e) Watercourses and streams.

(f) Materials needed in the construction of public improvements.

Estates and Interests Less than a Fee.

In order to constitute "property," in the legal sense of the term, it is not necessary that the person claiming compensation should be the owner in fee simple of the land taken. The owner of an estate for life or years, whether it be vested or contingent, and whether in possession, or reversion or remainder, the owner of a rent or easement affected by the appropriation of the land, a purchaser under an executory contract, and probably even a mortgagee or a judgment creditor, would also be entitled to compensation in proportion to his interest.

Property of State and United States.

It would appear, at first sight, that there could be no authority in a state to appropriate, under the power of eminent domain, property belonging to the United States, and conversely, that the federal government could not authorize the taking of property belonging to a state. But it is held that, unless the property in question has been already devoted to some public use under the authority of, or in connection with, the government of the United States, the state within

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whose borders the government land lies may authorize its condemnation under this power, for a public purpose, such as the construction of a railroad.[17] And in virtue of the control of the national government over navigable waters, as well as its power of eminent domain, it may authorize the construction of a bridge or other structure over such waters, and although a particular state may be the owner of the bed under such waters, on which the proposed structure is to rest, the federal government is not obliged to obtain the consent or authority of the state, or to make it any compensation.[18]

Franchises.

In a number of the states the constitutions provide that the right of eminent domain shall never be so construed as to prevent the legislature from taking the property or franchises of incorporated companies and subjecting them to public use the same as that of individuals. But even without such a provision in the organic law, franchises would be subject to this power in common with all other property within the state. Franchises are property, and there is nothing in their nature to exempt them from the liability to appropriation which attaches to all other property. They may therefore, if the public need requires it, be taken for public use on just compensation made.[19] A familiar example of the taking of a franchise under the power of eminent domain is where a toll bridge, erected and maintained by a private corporation, is condemned and converted into a free county or state bridge.

Possession and Enjoyment; Easements.

Every man is entitled by law to the undisturbed and exclusive enjoyment of his estate and to keep out all trespassers. And this right is part of his "property" in his estate. Consequently, if this exclusive enjoyment of property is taken away, there is a taking of the property, though the title is allowed to remain in the original owner. Moreover, there are certain easements appurte-

[17] U. S. v. Railroad Bridge Co., 6 McLean, 517, Fed. Cas. No. 16,114; U. S. v. Chicago, 7 How. 185.

[18] Stockton v. Baltimore R. Co., 1 Interstate Com. Rep. 411.

[19] Central Bridge Co. v. Lowell, 4 Gray, 474; Richmond, F. & P. R. Co. v. Louisa R. Co., 13 How. 71; Enfield Toll Bridge Co. v. Hartford & N. H. R. Co., 17 Conn. 40; West River Bridge Co. v. Dix, 6 How. 507; Com. v. Pennsylvania Canal Co., 66 Pa. St. 41.

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nant to real estate which are necessary to its beneficial enjoyment, and which cannot be impaired without the payment of just compensation to the owner of the estate. Such are the easements of access, light, and air. The construction of a public improvement (such as an elevated steam railroad in the streets of a city) may destroy or materially interfere with these easements, although the land itself and the buildings thereon are not taken possession of or injured except in respect to their beneficial use. These easements are "property," and may be thus taken under the power of eminent domain, but only upon the payment of just compensation.[20]

Streams.

Watercourses and streams of running water, which are not navigable, may be appropriated under the power of eminent domain, for such public purposes as the supplying of water to cities and towns, and the development of irrigation works intended for the benefit of an extensive district or neighborhood. In such cases, compensation must be made to those riparian proprietors who have, at common law, a right to have the stream continue to flow in its accustomed channel, and whose own private use of the water is abridged or interfered with by the taking of the stream for public use.[21]

Materials.

Such materials as may be needed in the construction of public improvements come within the class of subjects over which the power of eminent domain may be exercised. Thus, timber, gravel, earth, or stone to be used in making or mending highways, and trees, earth, and gravel used in building a railway, may be appropriated under due legislative authority. And in general, authority may be given to any person or corporation engaged in works of public improvement to enter upon adjoining lands and take therefrom such materials as are needed for the work of construction.[22]

[20] Lahr v. Railway Co., 104 N. Y. 268, 10 N. E. 528; Drucker v. Railway Co., 106 N. Y. 157, 12 N. E. 568.

[21] St. Helena Water Co. v. Forbes, 62 Cal. 182; Smith v. Gould, 59 Wis. 631, 18 N. W. 457; Lux v. Haggin, 69 Cal. 255, 10 Pac. 674.

[22] Wheelock v. Young, 4 Wend. 647; Parsons v. Howe, 41 Me. 218. In a state of war, private property may be taken by a military commander to prevent it from falling into the hands of the enemy, or for the purpose of

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Extent of Appropriation.

The general rule is that no more property shall be taken under the power of eminent domain, either in respect to quantity or interest, than is needed for the particular purpose. As the power is founded on necessity, so the measure of the public right, in any given case, must be determined by the actual requirements of the public use to which the property is to be put. For example, if a public building or a park is to be located on a tract of land more than sufficient in extent, no more of the land should be condemned and taken than is reasonably sufficient for the purpose. So also a railroad company should not be authorized to condemn more land than is needed for its right of way and works. It is true the owner may consent to the appropriation, and thus preclude himself from raising the question of the necessary extent of the appropriation. But unless he so consents, the mere fact of providing compensation will not justify an appropriation in excess of what is necessary. On the same principle, while the legislature may undoubtedly authorize the taking of the fee in land, if it shall judge it to be necessary, yet this is not to be done if a less interest in the public, such as a mere easement, would suffice. In such cases the easement consists only in the right to use the property for the purpose for which the appropriation was made. The fee remains in the original owner, subject to the easement, and whenever the public use shall be discontinued the full title will revert to him.

APPROPRIATION TO NEW USES.

177. When property which has already been appropriated to public use under the power of eminent domain is subsequently appropriated, under the same power, to a new and different use, then the original owner, provided an estate less than the fee was first taken or a portion of his land less than the whole, will be entitled to a new assessment and payment of compensation.

converting it to the use of the public; but the danger must be immediate and impending, or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. Mitchell v. Harmony, 13 How. 115.

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The reason for this rule is that when a part only of a tract of land is condemned, the amount of compensation to be awarded is determined, in some measure, according to the question whether the remaining land will be benefited or injured by the use to which the part taken is to be devoted. Now the first use may be of positive advantage to the rest of the property, while the new use may be seriously detrimental to it. At any rate, if there is any important difference in the two uses, this will of itself introduce new elements which should be taken into consideration in arriving at a just estimate of the damages to be paid. The owner is therefore constitutionally entitled to a fresh appraisement of the injuries which he sustains, in view of the new conditions and their effect upon his estate. In cases where the whole tract was affected by the first condemnation, but it extended only to the taking of an estate less than a fee, the same principle applies, but for a different reason. It is now important to inquire whether the owner's right of reverter, in case of the discontinuance of the public use, will be affected by the new appropriation.

Questions of this sort chiefly arise in connection with the construction of improvements in the public streets and highways. At first, the courts were disposed to make the right of an abutting property owner to recover damages upon the appropriation of the street to a new or different use depend upon the question whether the fee of the soil under the street was vested in him or in the municipality. But the later tendency is to disregard this distinction. The now generally prevalent doctrine is that the abutting owner, whether or not he owns the fee of the street, has certain peculiar rights and privileges therein which will entitle him to compensation if the street is diverted from its original use or is cumbered with new works which materially interfere with, or diminish the value of, those rights.[28]

[28] "Distinctions based upon the legal ownership of the fee in respect to the rights of the abutting proprietor have produced much confusion, resulting in many conflicting decisions; but the true principle, which has been slowly but surely evolved from protracted discussion and experience, is that in respect to the use of the soil for the purposes of a street (and apart from those reversionary or other rights peculiar to legal ownership) it is wholly immaterial where the legal title resides." White v. Railroad Co., 113 N. C. 610, 18 S. E. 330.

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Notwithstanding some difference of opinion, it is now apparently settled that the appropriation of a public highway for the purposes of a plank road or turnpike is not a devotion of it to such a new use as will require a new assessment and payment of damages to abutting owners. And conversely, turning a turnpike road into a free and common public highway is not appropriating any new easement so as to entitle the owners of the fee to fresh compensation.[24] And the same is true of the laying of gas pipes in a county highway.[25] Nor is any additional servitude imposed by the appropriation of a public highway for the use of a line of electric telegraph, by the erection of poles and wires above the surface of the ground; and a statute authorizing such appropriation is not unconstitutional because it makes no provision for compensation to the owners of the fee in the highway.[26] Also it is held that a street railway, where the motive power employed is horses or electric motors, constructed under legislative authority on the surface of a street, is not an unlawful interference with the rights of the abutting owner, but is a street use consistent with such rights, so that it will not entitle him to a new assessment and payment of damages.[27] But if a highway is appropriated to the use of a steam railroad, or a street in a city to the use of such a road (and more especially an elevated road), it is held that this is not a legitimate use for street purposes, but the conditions are so essentially different from those attending the first appropriation, which merely gave a public right of passage, as to entitle the abutting owners to compensation to the extent to which their property is injured or depreciated by the new use of the street.[28] When a railroad has been constructed in a street, and an abutting property owner has recovered damages therefor, this will not prevent him from claim-

[24] State v. Maine, 27 Conn. 641.

[25] Bloomfield & R. N. Gaslight Co. v. Calkins, 62 N. Y. 386.

[26] Pierce v. Drew, 136 Mass. 75.

[27] Mahady v. Railroad Co., 91 N. Y. 148; Hiss v. Railway Co., 52 Md. 242; Attorney General v. Metropolitan R. Co., 125 Mass. 515; People v. Ft. Wayne & E. Ry. Co., 92 Mich. 522, 52 N. W. 1010.

[28] Story v. Railroad Co., 90 N. Y. 122; White v. Railroad Co., 113 N. C. 610, 18 S. E. 330; Stewart v. Railroad Co., 38 W. Va. 438, 18 S. E. 604; Crawford v. Village of Delaware, 7 Ohio St. 459; Lawrence R. Co. v. Williams, 35 Ohio St. 168.

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ing further damages when another railroad seeks to build another track in the same street.[29]

THE TAKING.

178. In order to constitute a "taking" of property under the power of eminent domain, it is not necessary that the property should be destroyed, or that the owner should be entirely deprived or disseised of the estate. It is sufficient to entitle him to claim compensation if the work or improvement for which this power is exercised deprives him of the ordinary, necessary, and beneficial use of the property, or if its value, for such uses and purposes, is directly and necessarily diminished by the work in question.

The reason and spirit of the constitutional provision regulating the exercise of the power of eminent domain are broad enough to allow a recognition of the right of an owner to compensation in cases where, without any actual expropriation of his property, there is such damage done to it, by the work in progress, as diminishes its value for all purposes, or seriously interferes with its use for the purposes to which it is adapted. To constitute an appropriation of land, it is not necessary that there should be any trespass upon, or physical taking of, the property itself; any injury to the estate which deprives the owner of the ordinary and beneficial use of it is equivalent to a "taking" of the land.[30] For example, in a case in New Hampshire, it appeared that a railroad company, claiming to act under legislative authority, removed a natural barrier situated north of plaintiff's land, which theretofore had completely protected plaintiff's meadow from the effects of floods and freshets in a navigable river. In consequence of this removal, the waters of the river, in times of floods, flowed on to plaintiff's land, carrying sand, gravel, and stones thereon. It was held that this was a "taking" of plaintiff's property, within the meaning of the constitutional provision, and that the legislature could not authorize the

[29] Southern Pac. R. Co. v. Reed, 41 Cal. 256.

[30] Hooker v. Northampton Co., 14 Conn. 146; Martin v. Fillmore Co., 44 Neb. 719, 62 N. W. 863; Griffin v. Railroad Co., 41 La. Ann. 808, 6 South. 624.

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infliction of such an injury without making provision for compensation.[31] So, also, the diversion of a stream, when the effect is to injure the property of a private owner, by destroying his water power or depriving him of his riparian rights, is a taking of his property under the power of eminent domain.[32] So again, it is held that the construction of a public improvement (such as an elevated railroad in a city) which has the effect to charge the air with smoke, gases, cinders, etc., and thus to interfere with the easement, belonging to each abutting landowner, to the passage of pure air, or which impairs his easement of light, either by reason of the structure itself or by the passage of trains upon it, or which diminishes the value of the property by impairing its capacity for quiet enjoyment, by reason of the noise, vibration, and confusion caused by the ordinary use of it, so directly and seriously affects the value of adjoining property as to entitle the owner to claim damages, although there has been no physical taking of his property.[33] And again, a necessary part of the beneficial use of private property consists in the free right of access to a street, highway, or navigable stream on which it may abut. And where the effect and consequence of improvements or public works constructed by a municipal or private corporation are to deprive a property owner of the means of access to his premises,—as, where a railroad laid in the street shuts off the means of ingress and egress, or where public works constructed along the edge of a navigable river or lake prevent riparian proprietors from having free access to the water,—there is such an invasion of the owner's property rights (though

[31] Eaton v. Railroad Co., 51 N. H. 504. See, also, Smith v. Gould, 61 Wis. 31, 20 N. W. 369; Pumpelly v. Green Bay Co., 13 Wall. 166; Woodruff v. Mining Co., 18 Fed. 753.

[32] Harding v. Water Co., 41 Conn. 87; Pettigrew v. Village of Evansville, 25 Wis. 223. And this rule applies as well to navigable as to private streams. Even where the object of the diversion is to create a new and better channel, yet, if the result is to deprive the riparian owner of the benefit of the use of the stream, it is a taking for which compensation must be made to him. People v. Canal Appraisers, 13 Wend. (N. Y.) 355.

[33] Lahr v. Railway Co., 104 N. Y. 268, 10 N. E. 528; Drucker v. Railway Co., 106 N. Y. 157, 12 N. E. 568; New York El. R. Co. v. Fifth Nat. Bank, 135 U. S. 432, 10 Sup. Ct. 743; Adams v. Railroad Co., 39 Minn. 286, 39 N. W. 629; Jeffersonville, M. & I. R. Co. v. Esterle, 13 Bush (Ky.) 667.

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no portion of his land may be actually taken) that compensation must be made to him.[34] The right of the owner of a city lot abutting upon a street to use the street is as much property, it is said, as the lot itself, and the legislature has as little power to take away the one as the other; hence it cannot authorize the vacation of the street without providing compensation for such owners.[35] When the state has granted a right or franchise for business purposes (such as the right to maintain a toll bridge, a ferry, and the like) and the grant was by its express terms exclusive, the subsequent grant of a franchise of the same kind, the use of which will compete with the first and diminish its profitableness, amounts to a taking of the former franchise, within the meaning of the constitution.[36] It is also held in some states (though not in all) that if a railroad is constructed in close proximity to a man's house, and there is consequently a real, imminent, and constant danger of its being set on fire by the passing locomotives, and thereby its value, either for purposes of residence, business, or sale, is greatly diminished, such injurious effect upon the value of the property will found a claim for compensation.[37] And where one railroad company is authorized by statute to run its cars over the tracks of another, this is a taking for which compensation must be made.[38]

[34] Rumsey v. Railroad Co., 133 N. Y. 79, 30 N. E. 654; City of Pekin v. Brereton, 67 Ill. 477; Rigney v. City of Chicago, 102 Ill. 64; Chicago & W. I. R. Co. v. Ayres, 106 Ill. 511; Johnston v. Railroad Co., 18 R. I. 642, 29 Atl. 594; Philadelphia & R. R. Co. v. Patent (Pa.) 5 Atl. 747; Delaplaine v. Railroad Co., 42 Wis. 214; Chapman v. Railroad Co., 33 Wis. 629.

[35] Haynes v. Thomas, 7 Ind. 38; Pearsall v. Board, 74 Mich. 558, 42 N. W. 77. But compare Levee Dist. No. 9 v. Farmer, 101 Cal. 178, 35 Pac. 569.

[36] Piscataqua Bridge v. New Hampshire Bridge, 7 N. H. 35; Central Bridge Corp. v. City of Lowell, 4 Gray (Mass.) 474.

[37] See Swinney v. Railroad Co., 59 Ind. 205; St. Louis, Ft. S. & W. R. Co. v. McAuliff, 43 Kan. 185, 23 Pac. 102; Ft. Worth & R. G. Ry. Co. v. Downie, 82 Tex. 383, 17 S. W. 620; Pierce v. Railroad Co., 105 Mass. 199; Wilmington & R. R. Co. v. Stauffer, 60 Pa. St. 374; Lafayette, M. & B. R. Co. v. Murdock, 68 Ind. 137.

[38] Metropolitan R. Co. v. Quincy R. Co., 12 Allen (Mass.) 262; Sixth Ave. R. Co. v. Kerr, 45 Barb. (N. Y.) 138.

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CONSEQUENTIAL INJURIES.

179. Unless a different rule is prescribed by constitution or statute in the particular state, the owner of property is not entitled to claim damages in respect of any merely incidental, indirect, or consequential injuries which his property may sustain by reason of a public work or construction, where the same is justified by a lawful exercise of the powers of government, and there is no actual appropriation of any property or right to which he has a legal claim.

If the injury to property is merely incidental or indirect, or affects the property only as it affects all other property similarly situated, there can be no just claim to compensation, and, if property is actually appropriated under the power of eminent domain, the computation of damages must not include merely consequential or indirect injuries.[39] Thus, for instance, the privilege of maintaining a toll bridge, previously granted by statute, may be seriously impaired by a subsequent grant to another of a franchise to maintain another bridge near the first. Or the value of a dam may be destroyed by the construction of a canal, or that of a turnpike by the construction of a railroad. But in these cases, if the first grant was not in terms exclusive, so that there is no question of a contract which must not be impaired, the detriment which the first work will sustain in consequence of the construction of the second does not amount to such a taking of it as will require compensation to be made; it is merely the loss which any one may expect to suffer from successful competition.[40]

It is also a general principle that a municipal corporation making an improvement solely for the benefit of the public, under ample authority granted by the legislature, and performing the work in a circumspect and careful manner, and with no lack of care and

[39] Stewart v. Village of Rutland, 58 Vt. 12, 4 Atl. 420.

[40] White River Turnpike Co. v. Vermont Cent. R. Co., 21 Vt. 590; Enfield Toll-Bridge Co. v. Hartford & N. H. R. Co., 17 Conn. 454; Dyer v. Bridge Co., 2 Port. (Ala.) 296.

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reasonable skill, is not answerable for consequential damages produced thereby to property in the vicinity of such improvement, no part of which is taken or used therefor, although the same act, if done without legislative sanction, would be actionable.[41] It is a question whether the same rule is applicable in the case of a private corporation, making such an improvement primarily for its own advantage and benefit. In some of the states it is held that such a corporation is liable for all damages which would not be too speculative or remote to be recovered in an action against a natural person.[42] But in New York the doctrine prevails that, equally in the case of a private corporation as in that of a municipal corporation, an act done under the authority of law, if done in a proper manner, will not subject the party doing it to an action for the consequences, whatever they may be, if the law does not provide for compensation for injuries of that character.[43] To take another illustration, the value of private property may be seriously affected by a change of the grade of a city street on which the property abuts. But this is not a "taking" of the property, and the owner will not be entitled to claim compensation, unless, as is sometimes the case, the statute should make provision for it.[44]

But in many of the states it has been felt that the doctrine of consequential injuries left the owner of property without redress in many instances where he had been substantially damnified for the public good, and where, on just principles, compensation ought to be provided for him. In these states, therefore, the constitutional provisions on the subject have been made broader than the type which we have thus far considered. They are so expressed as to entitle the owner of property to just compensation in all cases where his property is "taken or damaged" for the public use.

[41] Alexander v. City of Milwaukee, 16 Wis. 247; Mayor, etc., of Cumberland v. Willison, 50 Md. 138; Transportation Co. v. Chicago, 99 U. S. 635.

[42] Alexander v. City of Milwaukee, 16 Wis. 247; Tinsman v. Railroad Co., 26 N. J. Law, 148.

[43] Radcliff's Ex'rs v. Mayor, etc., of Brooklyn, 4 N. Y. 195; Bellinger v. Railroad Co., 23 N. Y. 42; Selden v. Canal Co., 29 N. Y. 634. And see Benner v. Dredging Co., 134 N. Y. 156, 31 N. E. 328.

[44] See Mayor, etc., of Cumberland v. Willison, 50 Md. 138; In re Furman St., 17 Wend. (N. Y.) 649. Compare Crawford v. Village of Delaware, 7 Ohio St. 459.

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Where a constitution contains this wider formula, it is held that a recovery may be had in all cases where private property has sustained a substantial injury from the making and use of an improvement which is public in its nature, whether the damage be direct, as when caused by trespass or physical invasion of the property, or consequential, as in a diminution of its market value.[45]

COMPENSATION.

180. The constitutional provisions for the protection of private property, when the power of eminent domain is to be exercised, require that just compensation shall be paid to the owner. This requirement includes—

(a) The assessment of the amount of the damages—

(1) By a fair and impartial tribunal, not necessarily a jury.

(2) In a manner conforming to the directions of the constitution or statute.

(3) At the fair and just value of the property taken, or the fair and just measure of its depreciation in consequence of the work or improvement in question, allowing for direct benefits to other property of the same owner accruing therefrom, when a part only of a tract is taken, and also for corresponding injuries.

(b) The prepayment of the damages, at least where the appropriation is made by a private corporation.

(c) The payment of the damages in money.

The Tribunal for the Assessment of Damages.

The legislature, in exercising the power of eminent domain, cannot in the law itself fix the amount of compensation to be paid to the property owner. Such compensation, in case of disagreement

[45] Chicago v. Taylor, 125 U. S. 161, 8 Sup. Ct. 820. The reader will find an instructive case as to the difference between a constitutional provision authorizing compensation for property "taken" for public use, and one authorizing compensation for property "taken or damaged," in Rigney v. City of Chicago, 102 Ill. 64.

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between the parties, must be ascertained and awarded by a fair and impartial tribunal.[46] "While the legislature is the judge of the necessity or expediency of the exercise of the power of eminent domain, it is not the judge of the amount or justness of the compensation to be made when the power is exercised." And therefore, "when the constitution prescribes no particular mode in which the compensation shall be ascertained, it would seem to follow that, as to the question of the amount of compensation, the owner of land taken for public use has a right to require that an impartial tribunal be provided for its determination, and that the government is bound in such cases to provide such tribunal, before which both parties may meet and discuss their claims on equal terms."[47] But proceedings for an assessment of damages upon an exercise of the power of eminent domain are not controversies of that nature which is contemplated by the constitutional provisions securing the right of trial by jury in civil issues. Consequently the owner of property thus taken has no constitutional right to demand that his compensation shall be assessed by a jury, unless there is a specific provision to that effect in the state constitution.[48] The customary method is to provide for the appointment of a certain number of appraisers or commissioners (sometimes called "viewers") who are to determine the matter at issue according to their own judgment and the evidence which shall be adduced before them in relation to the value of the property or the extent of the injuries to it. These viewers, having duties to perform which are analogous to those of a jury, must be free from all legal disqualifications or disabilities and from all interest in the matter at issue, all relationship to the party, and all positive bias. They must strictly comply with the statute in regard to taking the oath and all other matters of substance.

[46] Pennsylvania R. Co. v. Baltimore & O. R. Co., 60 Md. 263. But, where private property has been taken or damaged by the state, it is competent for the legislature to agree with the owner as to the amount of the damage, if that can be done, and make an appropriation for its payment. In re Substitute for Senate Bill No. 83, 21 Colo. 69, 39 Pac. 1088.

[47] Langford v. County Com'rs of Ramsey Co., 16 Minn. 375 (Gil. 333).

[48] Pennsylvania R. Co. v. First German Congregation, 53 Pa. St. 445; Livingston v. Mayor, etc., of New York, 8 Wend. (N. Y.) 85; Butler v. City of Worcester, 112 Mass. 541; Backus v. Lebanon, 11 N. H. 19.

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Method of Assessing Damages.

In regard to the method and course of proceedings, on the assessment of damages, it may be remarked, as a general rule, that all such provisions of the constitution or the statute as are intended for the protection and advantage of the individual are to be strictly followed. He is to have every opportunity of contesting the proceedings, step by step, and of asserting and making good his claims to adequate compensation. For instance, the owner is entitled to due notice of the time and place at which the assessors will proceed to make their valuation, and he must be afforded an opportunity to be present, and if he attends he has a right to be heard and to present proper and pertinent evidence. If his rights, in any of these particulars, are abridged or denied, the proceedings will not be valid.[49] The award also should be in due form and executed and filed according as the law directs.

Measure of Compensation.

The rules for ascertaining the amount of compensation to be paid to the owner of property taken under the power of eminent domain are subject to some variations, depending on the circumstances of the particular case. But the general principles are always the same. And these may be arranged in three classes, according as the appropriation is of the whole of the tract or other property, or of only a portion thereof, or consists in injury and damage to the property without a physical taking of it.

In the first place, if the state or corporation takes the whole of a tract of land, or the franchise and plant of a corporation, or any other entire piece of property, the owner is entitled to receive the entire market value of the property. The market value is not the mere amount which the property has cost the owner; it may be much greater. Neither does it mean the amount which the property would bring at a forced sale, but what it would bring in the hands of a prudent seller at liberty to fix the time and the conditions of the sale.[50] If the property taken consists in the franchise and plant of a corporation, the market value is not to be ascertained

[49] Powers' Appeal, 29 Mich. 504; Hood v. Finch, 8 Wis. 381.

[50] Everett v. Union Pac. R. Co., 59 Iowa, 243, 13 N. W. 109; Somerville & E. R. Co. v. Doughty, 22 N. J. Law, 495.

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by the par value of the stock or the cost of the improvements, but it is measured by the actual selling value of the entire capital stock. If the property has been improved and prepared for the carrying on of a particular business, and has a special value for the purposes of that business only, so that the business in fact increases the value of the property, this fact should be considered in computing the damages, though it should not alone govern.[51] And conversely, the fact that the property has not in fact been appropriated to any beneficial use will not necessarily prove that it has no value. "The inquiry must be, what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted, that is to say, what is it worth from its availability for valuable uses?"[52] But on the other hand, the owner is not entitled to claim compensation for any damage which is merely remote, conjectural, or speculative.[53] Nor is he entitled to be compensated for any value, in excess of the market value, which the property may have in his eyes alone, arising from sentiment, association, or personal predilection. Such matters are not susceptible of pecuniary estimation, and do not properly enter into the computation. There is some uncertainty, on the authorities, as to the time at which the value to be put on the property is to become fixed. It may be either at the time of the commencement of the proceedings, or at the time of entry upon the property, or at the time of the view and appraisement. But at any rate, the value to be paid is that which the property bears at or before the completion of the condemnation proceedings, not that enhanced value which might afterwards attach to it in consequence of the uses to which it is to be put by the appropriator.

[51] King v. Railway Co., 32 Minn. 224, 20 N. W. 135; Chicago & E. R. Co. v. Jacobs, 110 Ill. 414; Little Rock & Ft. S. R. Co. v. McGehee, 41 Ark. 202. But where land is taken, future profits from the business carried on there, and which is stopped or interfered with by the appropriation, are too conjectural, speculative, and uncertain to form any basis for determining the market value of the property. Jacksonville & S. Ry. Co. v. Walsh, 106 Ill. 253; Chicago & E. R. Co. v. Dresel, 110 Ill. 89.

[52] Boom Co. v. Patterson, 98 U. S. 403.

[53] Fremont, E. & M. V. R. Co. v. Whalen, 11 Neb. 585, 10 N. W. 491.

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In the second place, if the appropriation extends only to a part of an entire tract belonging to the same owner, the amount of compensation is not to be measured solely by the market value of that which is taken. Here it will also be necessary to take into account the effect of the public work or improvement on the remaining portion of the estate. This effect may be either beneficial or injurious. In the first event, the increase of value accruing to the remainder of the estate is to be deducted from the amount to be awarded. In the second case, the compensation must be large enough to cover the depreciation of the balance of the tract.[54] For example, where a railroad company condemns and appropriates a right of way across a farm or other tract of land, the true measure of compensation to the owner is the difference between what the whole property would have sold for, unaffected by the railroad, and what it would sell for as affected by it, if it would sell for less. The damages must be for an actual diminution of the market value of the land.[55] In such a case the design of the law is to compensate the owner fully for all the injury he may sustain by reason of the appropriation of his land for railroad purposes, and which shall grow out of or be occasioned by the location and use of the road.[56] Consequently, it is proper for the jury or appraisers to take into consideration, in assessing the damages to be awarded in such a case, the danger and inconvenience of crossing the road from one part of the land to another,[57] the danger to the owner's cattle of being killed on the railroad, the additional inconvenience and expense entailed upon the owner in the cultivation and management of his remaining land, thus cut in two by the

[54] First Church in Boston v. City of Boston, 14 Gray (Mass.) 214; Edmands v. City of Boston, 108 Mass. 535; Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co., 17 W. Va. 812; Driver v. Railroad Co., 32 Wis. 569; Welch v. Railway Co., 27 Wis. 108; Parks v. Railroad Co., 33 Wis. 413; Robbins v. Railroad Co., 6 Wis. 636; Bigelow v. Railway Co., 27 Wis. 478; White v. Railroad Co., 6 Rich. Law (S. C.) 47; Tyler v. Hudson, 147 Mass. 609, 18 N. E. 582.

[55] Page v. Railway Co., 70 Ill. 324.

[56] St. Louis & S. E. Ry. Co. v. Teters, 68 Ill. 144.

[57] Somerville & E. R. Co. v. Doughty, 22 N. J. Law, 495; St. Louis & S. E. Ry. Co. v. Teters, 68 Ill. 144; Keithsburg & E. R. Co. v. Henry, 79 Ill. 290.

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road,[58] the expense of fencing along the road where it passes through fields,[59] and the danger from fire to the buildings, fences, timber, and crops on the remaining land.[60] But, on the other hand, in all cases of appropriation of part of a tract of land, mere speculative, remote, or contingent damages to the remaining parts are not to be taken into account or allowed for in the computation of damages.[61] Thus, the appraisers cannot take into consideration any anticipated loss to the plaintiff of profits in his business, by reason of the appropriation of a part of his land.[62]

In some few of the states, the constitutions provide that benefits accruing to the owner's remaining land cannot be set off against the damages to be awarded him.[63] But, unless such a provision is found in the constitution, the rule is that, in estimating the damages which a party sustains by the taking of a part of his tract of land for a public improvement, the local benefit accruing therefrom to the remainder may be considered and deducted from the damages occasioned by such taking; and where such benefit equals or exceeds the value of the land taken and the amount of the injury to the remainder, the owner sustains no legal damage and none can be allowed him.[64] But "the benefits to be considered and allowed by the jury, where only a part of an entire tract is taken, are not such as are common to lands generally in the vicinity, but such as result directly and peculiarly to the particular tract in ques-

[58] Tucker v. Railroad Co., 118 Mass. 546; McReynolds v. Railway Co., 106 Ill. 152; Somerville & E. R. Co. v. Doughty, 22 N. J. Law, 495.

[59] Greenville & C. R. Co. v. Partlow, 5 Rich. Law (S. C.) 428; Robbins v. Railroad Co., 6 Wis. 636; Reg. v. Committee Men for South Holland Drainage, 8 Adol. & E. 429.

[60] Swinney v. Railroad Co., 59 Ind. 205; Lafayette, M. & B. R. Co. v. Murdock, 68 Ind. 137; St. Louis, Ft. S. & W. R. Co. v. McAuliff, 43 Kan. 185, 23 Pac. 102.

[61] Ellsworth, M. N. & S. E. Ry. Co. v. Maxwell, 39 Kan. 651, 18 Pac. 819.

[62] Pittsburgh & W. R. Co. v. Patterson, 107 Pa. St. 461; Schuylkill Nav. Co. v. Freedley, 6 Whart. (Pa.) 109; Petition of Mt. Washington Road Co., 35 N. H. 134.

[63] See Woodfolk v. Railroad Co., 2 Swan (Tenn.) 421.

[64] Nichols v. City of Bridgeport, 23 Conn. 189; Trinity College v. City of Hartford, 32 Conn. 452; Jackson Co. v. Waldo, 85 Mo. 637; Platt v. Pennsylvania Co., 43 Ohio St. 228, 1 N. E. 420; Whitman v. Railroad Co., 3 Allen (Mass.) 133.

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tion; as, for instance, where property is made more available and valuable by opening a street through it, or when land is drained or otherwise directly improved."[65] For example, where the claim for damages grows out of the alteration of a highway, benefits caused by such alteration may be set off against the damages; but this benefit must be some direct, special, and peculiar benefit accruing to the plaintiff's land, and not the general benefit accruing to all the adjacent estates by reason of having a wider street. If the alteration, by cutting off some of the plaintiff's land, leaves him a smaller estate with a longer street frontage, which is of more value in the market, this is a benefit which should be counted. But unless he receives some benefit not received in common by all the other estates on that street between the two nearest cross streets, it is not to be deducted.[66] Furthermore, the benefits, like the damages, cannot be considered if they are merely remote, speculative, or conjectural. For example, in an action for damages to land in Wisconsin, resulting from the construction of a railroad, the fact that the road is a trunk line to Chicago is not such a benefit to the plaintiff as will be considered in abatement of the damages suffered by him.[67] And the damage done to one piece of land, through which a railroad is run, cannot be compensated by benefits accruing to another and separate piece of land, through which it does not run, though belonging to the same person.[68]

In the third place, if the taking does not consist in the actual appropriation of any specific property, but in injury to it, or diminution of its value, in consequence of the work or improvement for which the power of eminent domain is exercised, the assessment of compensation will become a measuring of damages. And the owner will be entitled to fair compensation for all such direct injuries to the property as accrue from the work in question and affect him personally in his ownership, use, or enjoyment of the property, and which are not common to the whole community.[69]

[65] Whitely v. Boom Co., 38 Minn. 523, 38 N. W. 753.

[66] Farwell v. City of Cambridge, 11 Gray (Mass.) 413; Dickenson v. Inhabitants of Fitchburg, 13 Gray (Mass.) 546. And see Mississippi Ry. Co. v. McDonald, 12 Heisk. (Tenn.) 54.

[67] Lafiin v. Railroad Co., 33 Fed. 415.

[68] Todd v. Railroad Co., 78 Ill. 530.

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Evidence.

As the proceeding before the viewers is more in the nature of an arbitration than of a jury trial, considerable latitude is allowed in regard to the introduction of evidence. The object being to ascertain the actual market value of the property taken (or the actual extent to which it has been injured by the public work or improvement, as the case may be), almost anything which has a legitimate tendency to show such value should be admitted. And the appraisers will also be justified in acting on their personal knowledge and opinion of the value of the property, though this should not influence them to the exclusion of legal and proper evidence.

Prepayment of Damages.

In a number of the states we find constitutional provisions to the effect that the compensation to be awarded to the owner of property which is appropriated for public use must be paid before the taking of the property. When this is not the case, the question, whether the law is invalid for postponing the payment of the compensation until after the owner is deprived of his property, will depend upon whether it is the state or a municipal corporation which takes the property or a private corporation. If the power of eminent domain is exercised for the benefit of the state or one of its municipalities, it is not essential that payment should first be provided, for it is supposed that the public faith is a sufficient pledge and guaranty for the payment of what is awarded. But in this case, the law must provide a means of making his claim effective against the state or the municipality, which shall be adequate and certain, and which may be initiated by the property owner himself at his own discretion.[70] But if the property is to be taken by a private corporation, the same reasons do not exist. On the contrary, it may well happen that the ability of the corporation to pay the damages which shall be assessed may be doubtful. Although there is no fixed and absolute rule on the subject, the better authorities agree that in such cases the statute should require the amount to be paid, or be held ready for payment, before the land passes into the exclusive control of the corporation.[71] But the

[70] Zimmerman v. Canfield, 42 Ohio St. 463; Wheeler v. Board, 39 N. J. Law, 291; Haverhill Bridge Proprietors v. County Com'rs of Essex, 103 Mass. 120.

[71] Wheeler v. Board, 39 N. J. Law, 291.

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owner of land taken by a private corporation under the power of eminent domain may, if he is sui juris, waive the right to exact prepayment of damages, by consenting, either expressly or by clear implication, to extend a credit to the company condemning, and allowing the damages to remain as a debt; but such waiver is not to be inferred without a clear indication, by words or acts, that the owner will not insist on his constitutional right.[72]

Payment to be Made in Money.

Since the appropriation of private property under this power is in the nature of a forced sale, it follows that the compensation to the owner must be made in money, or at least be pecuniary in character. The state, for instance, would have no power to compel the owner to accept other public lands in exchange for his lands thus taken. Nor could a railroad company, on appropriating lands, require the owner to accept a grant of other lands, licenses, or rights of way belonging to it.[73] But if the appropriation is made by a municipal corporation it seems that it may lawfully provide that the damages awarded shall be paid in interest-bearing bonds, either constituting a part of its existing debt, or issued specially for the purpose of meeting the new expense.

[72] New Orleans & S. R. Co. v. Jones, 68 Ala. 48; Fuller v. Commissioners, 15 Pick. (Mass.) 81; Marble v. Whitney, 28 N. Y. 297.

[73] See Chicago, S. F. & C. Ry. Co. v. McGrew, 104 Mo. 282, 15 S. W. 931; Vanhorne's Lessee v. Dorrance, 2 Dall. 304, 315.

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CHAPTER XVII.

MUNICIPAL CORPORATIONS.

181. Local Self-Government.
182–183. Nature of Municipal Corporations.
184. Power to Create Municipal Corporations.
185. Legislative Control of Municipal Corporations.
186. Debts and Revenue.
187–188. Officers of Municipalities.
189. Powers of Municipal Corporations.
190–192. By-Laws of Municipal Corporations.

LOCAL SELF-GOVERNMENT.

181. The principle of local self-government requires that local governmental affairs shall be decided upon and regulated by local authorities, and that the people of the municipal subdivisions of the state shall have the right to determine upon their own municipal concerns, without being controlled by the general public or the state at large.

The principle of local self-government is regarded as fundamental in American political institutions. It is not, however, an American invention, but is traditional in England, and is justly regarded as one of the most valuable safeguards against tyranny and oppression. "We learn from Blackstone and the elementary writers that the civil divisions of England, its counties, hundreds, tithings, or towns, date as far back as the times of the great Alfred. In all the changes of policy, of dynasty, of peace and internal war, and even of conquest, which that country has undergone since his day, these organizations have never been abated or abandoned. They are substantially at this time what they were before the Norman invasion. Wherever the Anglo-Saxon race have gone, wherever they have carried their language and laws, these communities, each with a local administration of its own selection, have gone with them. It is here they have acquired the habits of subordination, and obedience to the laws, of patient endurance, resolute purpose,

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and the knowledge of civil government which distinguish them from every other people. Here have been the seats of modern civilization, the nurseries of public spirit, and the centers of constitutional liberty. They are the opposites of those systems which collect all power at a common center, to be wielded by a common will, and to effect a given purpose; which absorb all political authority, exercise all its functions, distribute all its patronage, repress the public activity, stifle the public voice, and crush out the public liberty."[1] And in another case we read: "This right of self-government lies at the foundation of our institutions, and cannot be disturbed or interfered with, even in respect to the smallest of the divisions into which the state is divided for governmental purposes, without weakening the entire foundation; and hence it is a right not only to be carefully guarded by every department of the government, but every infraction or evasion of it to be promptly met and condemned, especially by the courts, when such acts become the subject of judicial investigation."[2]

This important principle finds its most pure and perfect expression in the town meeting of New England, which is a legal assembly of the qualified voters of a town, held at stated intervals or on call, for the purpose of electing town officers, and of discussing and deciding on questions relating to the public business, property, and expenses of the town. Although such pure democracy does not prevail throughout our country, yet it is in pursuance of the same general principle that municipal corporations are established in all the states, and invested with rights and powers of government subordinate to the general authority of the state, but exclusive within their sphere. And it is in reality but an extension of this principle that the government of the United States should be intrusted with only such powers and rights as concern the welfare of the whole country, while the individual states are left to the uncontrolled regulation of their internal affairs. The principle of local government being thus firmly implanted in our political system, it rests with the legislative authority of each state to apply and adjust it to the varying needs of its own people. That authority must determine what municipal corporations shall be created

[1] People v. Draper, 15 N. Y. 532, 561.

[2] People v. Albertson, 55 N. Y. 50, 57.

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and what shall be their powers and the limit of their jurisdiction, according to its view of the requirements of the different sections and districts of the state, and their capacity and need of local government.

In some of the states, the right of local government is guarded by constitutional provisions forbidding the legislature to make any private or special laws "regulating the internal affairs of towns and counties." In others, it is considered as one of the rights inherent in the people at the time of the adoption of the constitution, and reserved to the people by that instrument except as modified by the grant of authority to the legislature. Thus the supreme court of Indiana, speaking of a statute which attempted to create a fire department for a city, but making it entirely independent of the selection, regulation, or control of the municipal authorities, observes: "We hold that the right to provide and maintain a fire department in a town or city is one of the rights which are vested in the people of municipalities, and to be exercised by them, and is not subject to legislative interference, except in so far as they may prescribe rules to aid the people of the municipality in the exercise of such right; that such right is an element of local self-government, which was vested in the people of the municipalities at the time of the adoption of the constitution, and was not parted with by it; that so much of the statute under consideration as relates to the management and control of the fire departments of cities is unconstitutional and void." [8]

NATURE OF MUNICIPAL CORPORATIONS.

182. Municipal corporations are administrative agencies established for the local government of towns, cities, counties, or other particular districts.

183. The special powers conferred on them are not vested rights as against the state, nor are they in the nature

[8] State v. Denny, 118 Ind. 449, 21 N. E. 274. And see City of Evansville v. State, 118 Ind. 426, 21 N. E. 267. In the case of State v. Williams (Conn.) 35 Atl. 24, will be found an interesting discussion of the nature of local self-government and of how far the legislature is bound to recognize and provide for it.

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of contracts, but, being wholly political, they exist only during the will of the legislature. Such powers may at any time be changed, modified, repealed, or destroyed by the legislature, saving only the vested rights of individuals.

A municipal corporation is a public corporation created by the government for political purposes, and having subordinate and local powers of legislation; it is an incorporation of persons, inhabitants of a particular place or connected with a particular district, enabling them to conduct its local civil government.[4] The more usual kinds of municipal or quasi municipal corporations in this country are cities, towns, townships, boroughs, villages, parishes, counties, school districts, poor districts, and road districts.

The charter of a municipal corporation is not a contract, within the meaning of that clause of the federal constitution which forbids the passage of laws impairing the obligation of contracts. Hence it follows that such charters may be altered, amended, or repealed by the legislature at its own discretion, without any violation of that clause, provided only that private vested rights are not infringed by the action which it may take in regard to the charter.[5] And municipal corporations, being creatures of legislation, have no constitutional guaranty of trial by jury, and such trial may be denied to them.[6] They are liable to have their public powers, rights, and duties modified or abolished at any time by the legislature. They are allowed to hold privileges or property only for public purposes. Hence, generally, the doings between them and the legislature are in the nature of legislation rather than compact.[7] And one legislature cannot impose restrictions on the powers of a municipal corporation which a future legislature cannot modify or abrogate, except where a vested right or the obligation of a contract might be thereby divested or impaired.[8]

[4] Philadelphia v. Fox, 64 Pa. St. 169, 180.

[5] Brown v. Hummel, 6 Pa. St. 86, 92; Philadelphia v. Fox, 64 Pa. St. 169; Yarmouth v. North Yarmouth, 34 Me. 411; Berlin v. Gorham, 34 N. H. 266; Paterson v. Society, 24 N. J. Law, 385; Marietta v. Fearing, 4 Ohio, 427.

[6] Borough of Dunmore's Appeal, 52 Pa. St. 374.

[7] Town of East Hartford v. Hartford Bridge Co., 10 How. 511, 534.

[8] State v. Pilsbury, 31 La. Ann. 1.

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POWER TO CREATE MUNICIPAL CORPORATIONS.

184. The power to distribute the administrative functions of government, and from time to time to change their distribution, belongs exclusively to the legislature, and this includes the power—

(a) To incorporate cities and other municipal corporations.[9]

(b) To establish, modify, or change their territorial boundaries.

(c) To classify the cities of the state according to population or some other reasonable principle of division.

Creation of Municipalities.

The creation of municipal corporations is generally accomplished either by a special grant of a charter, or (where this is forbidden by the state constitution, as is now generally the case) by the enactment of a general law under which such corporations may be organized whenever the particular district possesses the requisite population and complies with the other conditions of the act. When the constitution empowers the legislature to establish but one system of town and county government, to be as nearly uniform as practicable, absolute uniformity is not required.[10]

Boundaries.

As it is for the legislature to determine whether municipal corporations shall be established, and how the subordinate functions of government shall be apportioned to them, so also it is within its power, unless restrained by the constitution, to decide what shall be the territorial boundaries of a city, county, or other such corporation, and after having established the boundaries it may, in its discretion, modify or change them, subject only to the proviso that private vested rights must not be injured by the alterations. Thus, the legislature may annex or authorize the annexation of territory contiguous to the limits of an incorporated town or city, without

[9] Turner v. Althaus, 6 Neb. 54; Hope v. Deaderick, 8 Humph. (Tenn.) 1.

[10] Cathcart v. Comstock, 56 Wis. 590, 14 N. W. 833.

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the consent of the persons residing either in the corporation or the annexed territory.[11] But if the legislature should prescribe that such territory should not be annexed to the municipality unless a majority of the persons living therein should assent thereto, this would not be an unlawful delegation of legislative power, but a concession to the parties to be affected of the privilege of accepting or rejecting a charter.[12] Statutes fixing the boundaries of counties, and dividing such counties into towns, and providing for town organizations, are held to be properly within the sphere of the powers of the legislature, even though not expressly specified in the constitution.[13] And an act of the legislature fixing the county seat is not unconstitutional because it was passed without any consultation with the people of the county and without giving them an opportunity to petition the legislature; nor because two places were named in the act, and the choice between them left to the popular vote.[14]

Classification.

It is now a common practice to divide the cities of a state into several classes, according to their population, giving to those of each class a certain range of powers or privileges, or a form of government, different from those accorded to the other classes, the object being to adapt the municipal government and powers to the varying conditions and needs of the different populations. Laws making such a classification are not open to the objection that they are local or special. "A law applying to a certain class of cities, fixed by previous legislation, into which other municipal corporations may enter, and from which they may pass into other classes, by increase of population, is not special but general, since the grade of any particular city is not designated by the act, but depends upon its growth in population, as it may, by such growth, pass from one grade or class into another."[15] And it is no constitutional objection

[11] Graham v. City of Greenville, 67 Tex. 62, 2 S. W. 742; Stilz v. City of Indianapolis, 55 Ind. 515; Martin v. Dix, 52 Miss. 53.

[12] Graham v. City of Greenville, 67 Tex. 62, 2 S. W. 742.

[13] Chicago & N. W. Ry. Co. v. Langlade Co., 56 Wis. 614, 14 N. W. 844.

[14] Ex parte Hill, 40 Ala. 121.

[15] State v. Hawkins, 44 Ohio St. 98, 108, 5 N. E. 228; Land, Log & Lumber Co. v. Brown, 73 Wis. 294, 40 N. W. 482; People v. Henshaw, 76 Cal. 436,

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to such a law that there may be, at the time, only one city in the state which possesses a sufficient population to bring it into one of the designated classes,[16] unless it is evident that the legislature merely sought in this manner to evade the constitutional prohibition against special laws. It is possible that there may be other bases for classification beside the relative population, but whatever system is adopted, it must be such as to show clearly the need of differences in powers or governments. "The true principle of classification," says the court in New Jersey, "requires something more than a mere designation by such characteristics as will serve to classify, for the characteristics which will thus serve as a basis of classification must be of such a nature as to mark the object so designated as peculiarly requiring exclusive legislation. There must be a substantial distinction, having a reference to the subject matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will, in some reasonable degree, at least, account for or justify the restriction of the legislation." [17]

LEGISLATIVE CONTROL OF MUNICIPAL CORPORATIONS.

185. In respect to all those matters in which the people of the state generally have an interest or concern, the legislature may require and compel the municipalities to discharge duties, perform works, and if necessary contract debts. But in regard to matters of purely local concern, which are not of importance to the state at large, and which are generally best regulated by the local authorities, the rule of local self-government requires that the municipality should be controlled only by the preferences and determinations of its own citizens.

18 Pac. 413; State v. Hunter, 38 Kan. 578, 17 Pac. 177; Paul v. Gloucester Co., 50 N. J. Law, 585, 15 Atl. 272.

[16] State v. Miller, 100 Mo. 439, 13 S. W. 677; State v. Graham, 16 Neb. 74, 19 N. W. 470; State v. Hudson, 44 Ohio St. 137, 5 N. E. 225.

[17] State v. Hammer, 42 N. J. Law, 435.

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The double function of municipal corporations requires them to assume a share in the performance of state duties, as the legislature shall apportion the same, and also to regulate matters which concern only the particular community. In respect to the first class of duties, the legislature has the control, and it may grant, modify, or abrogate municipal powers as its wisdom shall dictate. It may also, within the same field, coerce a municipal corporation into the discharge of its proper functions, by laws requiring it to make contracts, issue bonds, or undertake public works. Thus, a city or county may be compelled to maintain local courts or a local police system, to lay out and keep in repair public highways, build bridges, and erect suitable public buildings. But in regard to its own local needs or advantages, the municipality alone is to judge of the desirability of making contracts, undertaking works, or incurring debts, and in these matters it cannot be compelled against its will to adopt the wishes of the state legislature. Thus, in regard to the maintenance of municipal parks, the question of a municipal system of gas or waterworks, and other such private and local affairs, it is not in the lawful power of the legislature to force the municipality into engagements or debts.[18]

While municipal corporations are subordinate agencies of government, and, as such, subject to the regulation and control of the legislative authority of the state, yet they are also, in some particulars, assimilated to private corporations in respect to their rights and powers. "Over all its civil, political, or governmental powers," says Dillon, "the authority of the legislature is, in the nature of things, supreme and without limitation, unless the limitation is found in the constitution of the particular state. But, in its proprietary or private character, the theory is that the powers are supposed not to be conferred primarily or chiefly from considerations connected with the government of the state at large, but for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual; and

[18] In regard to these general propositions, see Kimball v. County of Mobile, 3 Woods, 555, Fed. Cas. No. 7,774; People v. Draper, 15 N. Y. 532; Mayor, etc., of Baltimore v. State, 15 Md. 376; People v. Common Council of Detroit, 28 Mich. 228; Western Sav. Fund Soc. v. Philadelphia, 31 Pa. St. 175; Park Com'rs v. Mayor of Detroit, 29 Mich. 343.

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as to such powers, and property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded quoad hoc as a private corporation, or at least not public in the sense that the power of the legislature over it or the rights represented by it is omnipotent." [19]

And the power of the legislature to control the municipal corporations is also limited by the necessity of preserving the rights of third persons which may in some cases intervene. Thus, the right to interfere with the powers and government of a city cannot be so exercised as to deprive bona fide creditors of the municipality of their remedies against it. The power of taxation, for example, cannot be so abridged that persons who had previously become creditors of the city, relying on its power to levy taxes to pay its debts, shall be deprived of all effectual means of collecting their claims.[20]

DEBTS AND REVENUE.

186. The legislature has power to require and compel a municipal corporation to pay its just debts, even when they are not enforceable by the ordinary processes of law, and to this end it may require the municipality to raise money by taxation.

It matters not that the particular claim is not such as the courts would enforce without further legislative authority. If a moral obligation exists, the legislature may give it legal sanction. A law requiring a municipal corporation to pay a demand against it which is without legal obligation, but which is equitable and just

[19] 1 Dill. Mun. Corp. § 66. The state may make a contract with, or grant to, a municipal corporation, which it cannot subsequently impair or resume. "A grant may be made to a public corporation for purposes of private advantage, and, although the public may also derive a common benefit therefrom, yet the corporation stands on the same footing, as respects such grant, as would any body of persons upon whom like privileges were conferred." County of Richland v. County of Lawrence, 12 Ill. 1; Spaulding v. Andover, 54 N. H. 38.

[20] Von Hoffman v. City of Quincy, 4 Wall. 535; Nelson v. St. Martin's Parish, 111 U. S. 716, 4 Sup. Ct. 648; State v. Common Council of Madison, 15 Wis. 30; Goodale v. Fennell, 27 Ohio St. 426.

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in itself, being founded upon a valuable consideration received by the corporation, is not open to constitutional objection, as being retroactive, or otherwise.[21] Thus, the legislature may authorize a municipality to issue bonds for a debt contracted, without legislative authority, for the improvement of its streets.[22] But the legislature cannot compel a municipal corporation to pay a claim which it is under no obligation, legal or moral, to pay; nor can it require a court to render judgment on proof of the amount thereof.[23]

The revenues of a county are not the property of the county in the sense in which those of a private person or corporation are regarded. The whole state has an interest in the revenue of a county, and for the public good the legislature must have the power to direct its application.[24]

OFFICERS OF MUNICIPALITIES.

187. Officers having to do with municipal corporations are of two sorts:

(a) Those whose functions concern the whole state or its people generally, although territorially restricted.

(b) Those whose powers and duties relate exclusively to matters of purely local concern.

188. Officers of the former class may be appointed or regulated by the state authorities; but the principle of local self-government requires that the choice of officers of the latter class should be left exclusively to the people of the particular community.

[21] Lycoming v. Union, 15 Pa. St. 166; New Orleans v. Clark, 95 U. S. 654. It is competent for the legislature of a state to require a county to pay a just debt after the lapse of such time as would bar it by limitation. County of Caldwell v. Harbert, 68 Tex. 321, 4 S. W. 607.

[22] Mutual Ben. Life Ins. Co. v. City of Elizabeth, 42 N. J. Law, 235.

[23] Hoagland v. City of Sacramento, 52 Cal. 142; Supervisors of Sadsbury Tp. v. Dennis, 96 Pa. St. 400.

[24] People v. Power, 25 Ill. 169.

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"The administration of justice, the preservation of the public peace, and the like, although confided to local agencies, are essentially matters of public concern; while the enforcement of municipal by-laws proper, the establishment of gas works or water works, the construction of sewers, and the like, are matters which pertain to the municipality as distinguished from the state at large."[25] Thus, a municipal board of police is clearly an agency of the state government, and not of the municipality, and therefore belongs to the first class above mentioned.[26] But on the other hand, a statute which has the effect of placing in the hands of a board of public works, who are to be appointed by the legislature, the exclusive control of the streets, bridges, police and fire departments, etc., in cities subject to its provisions, without the consent of those to be affected thereby, infringes upon the inherent right of the citizens to local self-government and is unconstitutional.[27]

POWERS OF MUNICIPAL CORPORATIONS.

189. The powers vested in a municipal corporation are restricted to the following three classes:

(a) Those expressly granted to it in its charter, or in constitutional or statutory provisions applicable to it.

(b) Those granted by necessary or fair implication from the terms of the same instruments.

(c) Those which are necessary to enable it to exercise its granted powers and effect the objects of its incorporation.

"A municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation,

[25] 1 Dill. Mun. Corp. § 58. [26] People v. Hurlbut, 24 Mich. 44.
[27] State v. Denny, 118 Ind. 382, 21 N. E. 252.

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and the power is denied. Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void. Much less can any power be exercised or any act done which is forbidden by the charter or statute." [28]

But besides the powers enumerated in the charter, there are certain implied powers which belong to municipal corporations merely in virtue of their status as public corporations. These are such as are necessary to enable the corporation to exercise its enumerated powers and to carry out the objects of its incorporation, and they are considered as inherent in the corporation because it must be presumed that they were within the contemplation of the incorporating power, which would not have granted a charter without the means to carry on a corporate existence. For example, a city incorporated by the legislature has the capacity to sue and be sued in its corporate name, as one of its ordinary and essential powers; and it is not necessary in pleading for such a corporation to aver its legal capacity to sue.[29] So, also, the power to remove a corporate officer from his office is one of the common-law incidents of all corporations, including municipal corporations.[30]

BY-LAWS OF MUNICIPAL CORPORATIONS.

190. Municipal corporations are invested with subordinate powers of government, including the power to enact by-laws or ordinances which, within their sphere, shall have the force of law.

191. Municipal by-laws or ordinances, to be valid, must be—

(a) Consistent with all laws of a higher nature.

(b) Authorized by the charter or a statute.

[28] 1 Dill. Mun. Corp. § 89. And see Spaulding v. City of Lowell, 23 Pick. (Mass.) 71; Ottawa v. Carey, 108 U. S. 110, 2 Sup. Ct. 361.

[29] City of Janesville v. Milwaukee & M. R. Co., 7 Wis. 484.

[30] Richards v. Clarksburg, 30 W. Va. 491, 4 S. E. 774.

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(c) Reasonable.
(d) Impartial.
(e) Certain.

192. The legislative power vested in a municipality cannot be delegated, but must be exercised by the municipality through its appointed agencies.

Power to Enact By-Laws.

Since municipal corporations are agencies of government, operating within a limited sphere, and since the regulations which they may establish will generally come into the closest relation with the conduct of the citizens, it is eminently proper that they should be invested with adequate powers to make ordinances in matters of police. All those matters which concern the public safety, comfort, health, or morals, are best regulated, in their more minute details, by the people of each community for themselves. And the general policy of our institutions is to intrust a large measure of discretion, in these particulars, to the several municipalities. Thus, in the absence of specific constitutional restrictions, it is competent for the legislature of a state, by a general incorporation law or by a particular charter, to empower a municipality to make ordinances, operative within its limits, for the regulation or licensing of the traffic in intoxicating liquors, although the subject may already be provided for by the general laws of the state. And a municipal charter or its by-laws may thus either expressly or by necessary implication, supersede the general laws on the subject, within the limits of the corporation.[81]

Conformity with Higher Laws.

The power of a municipal corporation to enact by-laws or ordinances is subject to the limitation that they must not conflict with any provision of the constitution of the United States, any treaty, any act of congress, any provision of the constitution of the state, or any provision of the general statutes of the state. All these are laws of a superior nature, to which the inferior must conform. A municipal by-law repugnant to any of them is ultra vires

[81] Davis v. State, 2 Tex. App. 425; Com. v. Fredericks, 119 Mass. 199; State v. Harper, 42 La. Ann. 312, 7 South. 446.

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and can have no efficacy.[32] Moreover, as we have seen, the powers of a municipality are limited to those granted in its charter or in statutory provisions applicable to it. It will, of course, follow that a by-law not authorized to be passed by either the plain terms or necessary implications of such charter or statute is invalid.

Reasonableness.

The validity of municipal ordinances may also depend upon their reasonableness. But here it is necessary to distinguish between such as are enacted under a specific grant of power and such as are passed under a general or implied grant. "Where the legislature in terms confers upon a municipal corporation the power to pass ordinances of a specified and defined character, if the power thus delegated be not in conflict with the constitution, an ordinance passed in pursuance thereof cannot be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental powers of the corporation, or under a grant of power general in its nature. In other words, what the legislature distinctly says may be done cannot be set aside by the courts because they may deem it unreasonable or against sound policy. But where the power to legislate on a given subject is conferred, and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid."[33] To illustrate, an ordinance prohibiting the opening of streets for the purpose of laying gas mains, between the 1st of December and the 1st of March, is a reasonable regulation; but an ordinance prohibiting gas companies from opening a paved street, at any time, for the purpose of laying pipes from the main to the opposite side of the street, is unreasonable and void.[34] An ordinance regulating the keeping and retailing of gunpowder, or other dangerous substances, is valid, if it makes no unreasonable discriminations against persons or classes

[32] City of Burlington v. Kellar, 18 Iowa, 59; Pesterfield v. Vickers, 3 Cold. (Tenn.) 205; Philadelphia & R. R. Co. v. Ervin, 89 Pa. St. 71.

[33] Ex parte Chin Yan, 60 Cal. 78; 1 Dill. Mun. Corp. § 328; Coal-Float v. City of Jeffersonville, 112 Ind. 15, 19, 13 N. E. 115.

[34] Commissioners, etc., of Northern Liberties v. Northern Liberties Gas Co., 12 Pa. St. 318.

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of persons.[35] But all by-laws or ordinances of municipal corporations which are in restraint of trade, or which tend to create monopolies, are void,[36] unless they are distinctly justifiable as police regulations. Thus, ordinances in relation to public markets are not valid if they make unreasonable restrictions, or operate to restrain trade, or tend to create a monopoly.[37] The same is true of an ordinance which attempts to restrain persons from employing others in a lawful business beyond certain limits.[38]

Impartiality.

Municipal ordinances must be impartial. For instance, an ordinance which gives to one sect or religious denomination privileges which it denies to others violates the constitution and is void.[39] So, an ordinance which prevents one citizen from engaging in a particular kind of business in a certain locality, under a penalty, while another is permitted to engage in the same business in the same locality, is unreasonable and void.[40] Again, a municipality may provide modes of punishment for offenders against its police ordinances, by general ordinances affecting all persons alike, but has no power to single out any individual, and denounce his trade, occupation, or conduct.[41] And so, a city ordinance exacting a license fee for selling goods, which fixes one rate of license for selling goods which are within the city or in transit to it, and another and much larger license for selling goods which are not in the city, is invalid, as being unjust, unequal, oppressive, and in restraint of trade.[42]

Certainty.

It is next required of municipal ordinances that they shall be definite and certain.[43] This requirement is specially important if the ordinance is penal; that is, enjoining or prohibiting the doing

[35] Williams v. City Council, 4 Ga. 509.

[36] City of Chicago v. Rumpff, 45 Ill. 90; Hayes v. City of Appleton, 24 Wis. 542.

[37] City of Bloomington v. Wahl, 46 Ill. 489; Bethune v. Hughes, 28 Ga. 560.

[38] Ex parte Kuback, 85 Cal. 274, 24 Pac. 737.

[39] City of Shreveport v. Levy, 26 La. Ann. 671.

[40] Tugman v. City of Chicago, 78 Ill. 405.

[41] Board of Councilmen of Baton Rouge v. Cremonini, 36 La. Ann. 247.

[42] Ex parte Frank, 52 Cal. 606.

[43] San Francisco Pioneer Woolen Factory v. Brickwedel, 60 Cal. 166.

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of some act under a penalty. In such cases it is necessary that it should describe the offense with certainty, and also it must fix the penalty with precision, and not leave its measure to the discretion of any officer. For instance, where an ordinance provided that for a certain offense the offender might be fined by the mayor not more than five dollars, it was held that the ordinance was void because the amount of the fine was not fixed and definite; though it might have been valid if the ordinance had imposed a fine of a certain amount, with power in the mayor to remit a portion thereof in his discretion.[44] A city ordinance providing for grading and macadamizing a street is not void for uncertainty because the specifications for the work are not embodied in the ordinance, they being referred to as on file in the office of the city clerk.[45]

Delegation of Power.

A general rule of constitutional law prohibits the delegation of legislative power. But it is not regarded as a violation of this rule for the legislature, in creating municipal corporations, to invest them with appropriate powers of legislation for the due administration of the affairs of the municipality. But no such principle will justify the municipal authorities in attempting to make a delegation of the powers confided to them. All such powers as are essentially legislative in their nature must be exercised by the municipality itself or its duly authorized agents and officers pointed out by law. No such power can lawfully be turned over to the discretion of a private person, or to any officer or board of officers not authorized by the charter to exercise it.

[44] State v. Cainan, 94 N. C. 883.

[45] Becker v. City of Washington, 94 Mo. 375, 7 S. W. 291.

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CHAPTER XVIII.

CIVIL RIGHTS AND THEIR PROTECTION BY THE CONSTITUTIONS.

193–194. Rights in General.
195. Of Liberty.
196–198. Religious Liberty.
199–201. Personal Liberty.
202. Abolition of Slavery.
203. Right to Bear Arms.
204. The Pursuit of Happiness.
205. Equal Protection of the Laws.
206–208. Right to Choose Occupation.
209. Marriage and Divorce.
210. Sumptuary Laws.
211. Education.
212. Due Process of Law.
213. In Revenue and Tax Proceedings.
214. In Judicial Action.
215. Protection of Vested Rights.
216–217. Searches and Seizures.
218. Quartering of Soldiers.
219. Right to Obtain Justice Freely.
220–228. Trial by Jury.

RIGHTS IN GENERAL.

193. With respect to the constitution of civil society, and in the sense in which the term is used in public law, "rights" are powers of free action.

194. Rights are classified as—

(a) Natural.

(b) Civil.

(c) Political.

Some rights are created by law, but others exist antecedently and independently of law. The latter class includes such rights as belong to a man merely in virtue of his personality. His existence as an individual human being, clothed with certain attributes, invested with certain capacities, adapted to a certain kind of life,

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and possessing a certain moral and physical nature, entitles him, without the aid of law, to such rights as are necessary to enable him to continue his existence, develop his faculties, pursue and achieve his destiny. But some other rights are the offspring of law. They imply not only an individual but a state. They are not grounded alone in personality, but in an organized society with certain juristic notions. Still others add to these pre-requisites the idea of a participation in government or in the making of laws. We perceive, therefore, that for the purposes of constitutional law, rights are of three kinds. They may be classified as natural, civil, and political rights.

Natural Rights.

It was formerly the custom to use this term as designating certain rights which were supposed to belong to man by the "law of nature" or "in a state of nature." But clearer modern thought has shown that the "state of nature" assumed by the older writers is historically unverifiable and inadequate to account for the origin of rights. Even in savagery there is a rudimentary state. The law of physical nature recognizes no equality of rights; its rule is the survival of the fittest. In a state of nature, such as was once supposed, there could be no right but might, no liberty but the superiority of force and cunning. In reality, the only true state of nature is a civil state, or at least a social state. But it is permissible to use the phrase "natural rights" as descriptive of those rights which grow out of the nature of man and depend upon personality, as distinguished from such as are created by law and depend upon civilized society. An example of these natural rights is the right to life.

Civil Rights.

But since organized society is the natural state of man, and not an accident, it follows that natural rights must be taken under the protection of law, and although they owe to the law neither their existence nor their sacredness, yet they are effective only when recognized and sanctioned by law. Civil rights therefore will include natural rights, as the same are taken into the sphere of law. But there are also civil rights which are not natural rights. Thus, the right of trial by jury is not founded in the nature of man, nor does it depend upon personality. But it comes within the definition

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of civil rights, which are the rights secured by the constitution of any given state or country to all its citizens or to all its inhabitants, and not connected with the organization or administration of government. Hence it appears that while the term "civil rights" is broader than "natural rights," and indeed includes it, there are important differences between those civil rights which are properly described as "natural" and those which are not. Natural rights are the same all the world over, though they may not be given the fullest recognition under all governments. Civil rights which are not natural rights will vary in different states or countries.

Political Rights.

Political rights are such rights as have relation to the participation of the individual, direct or indirect, in the establishment or administration of government. For example, the right of citizenship, that of suffrage, the right to petition government for a redress of grievances, the right of free criticism of public officers and government measures, are political rights. They are not natural rights in any sense, since they owe their existence entirely to law. They are civil rights in a qualified sense, since they concern the citizen in his relations with other citizens, but only in respect to the administration of the state. But they are best considered as a separate class. Political rights vary in different countries even more widely than civil rights. Under a despotism they scarcely exist. In our own country they have reached their maximum.[1]

OF LIBERTY.

195. Liberty, whether natural, civil, or political, is the lawful power in the individual to exercise his corresponding rights. It is greatly favored in law. But it is restrained by the rights of the state and by the equal rights of all other individuals living under the same government.

[1] The natural rights of a citizen are inalienable, and no law, restrictive or prohibitory, of those rights can be passed by the legislature or the people of the state. But a political right stands on a different footing, and may be extended or recalled at the will of the sovereign power. Ridley v. Sherbrook, 8 Cold. (Tenn.) 569.

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As rights are powers of free action, it follows that liberty must be the power in the possessor of rights to make them available and effective, without extraneous hindrance or control except such as may be imposed by lawful measures. And as rights are divided into natural, civil, and political, the different kinds of liberty must be subject to the same classification. Natural liberty is not correctly described as that which might pertain to man in a state of complete isolation from his fellows. But it is the liberty to enjoy and protect those rights which appertain to his nature as a human being living in society with his kind. Civil liberty is the power to make available and to defend (under the sanctions of law) those rights which concern the relations of citizen with citizen and which are recognized and secured by the fundamental law of the state. Political liberty embraces the right to participate in the making and administration of the laws.

"In favor of life, liberty, and innocence," says the maxim, "all presumptions are to be indulged." According to Bracton, "liberty does not admit of estimation," that is, it cannot be valued or priced; it is invaluable. Such also were the doctrines of the Roman law. "Libertas inestimabilis res est," we read in the Digest. And again, "Libertas omnibus rebus favorabilior."

But although liberty is thus the foundation of rightful government, and is under the special favor and protection of law, it does not follow that it is unregulated by law. In an organized civic society, living under the dominion of law, liberty is something very different from mere license. The state has the right to take measures essential to its own health and preservation, and to enact regulations for the dealings of citizen with citizen. And rights must be exercised in accordance with these laws. By them liberty is not so much restricted as defined. Liberty is marked out, on the one side, by the reciprocal duties of government and subject, and on the other side, by the co-existence in all of equal rights. The state has a right to maintain its own existence. And for that reason it is not within the rightful freedom of any individual to subvert the government, and treason may be punished by law. For the same reason, the private right of property is subject to the condition that all persons shall contribute of their property to the support of the state. The state exists on condition that it shall assure to each

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the undisturbed enjoyment of his rights. Hence the legality of criminal justice. The government also is bound to protect the public health, safety, and morals against the aggressions of individuals. And thus the freedom of all may be limited by proper police regulations. Moreover, if the public good requires the appropriation of private property to public use, it may be taken under the power of eminent domain. Secondly, it is the necessary condition to the union of men in a jural society that each shall respect the rights of others. Indeed, a large school of political economists define the law of liberty as granting to each person the freedom to do all that he wills, provided he does not infringe upon the equal freedom of any other person. Whenever, therefore, a man's unrestrained choice as to his acts or conduct would lead him into collision with the equal rights of others, at that point his liberty stops. This principle is expressed in the common law maxim, sic utere tuo ut alienum non laedas. Not only is this rule a lawful limitation upon individual freedom, but without it liberty could not exist. But for the recognition and enforcement of such a rule, freedom would be the prerogative of the strong and slavery the heritage of the weak.

It is the purpose of the present chapter to exhibit the great guaranties of natural and civil liberty imbedded in our constitutions, and at the same time to direct attention to their proper limitations.

RELIGIOUS LIBERTY.

196. Both the federal constitution and the constitutions of the several states contain provisions securing to all people entire freedom of conscience or religious liberty.

197. These constitutional provisions do not prevent or render invalid—

- **(a) Recognition of the fact that the great mass of the American people are adherents of the Christian religion.**
- **(b) Public recognition and encouragement of religion, where no constraint is put upon the conscience of any person.**
- **(c) The enactment of Sunday laws.**

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(d) The enactment of laws punishing blasphemy as a crime.

198. But the guaranties of religious liberty forbid and prevent—

(a) The recognition of any particular form of religion as the established and compulsory religion of the state.

(b) The appropriation of the public money or the public influence to the support of any church, sect, or religious body.

(c) The persecution of any individual for conscience's sake, or the violation of his conscientious scruples.

(d) Religious tests as a qualification for office.

Constitutional Guaranties.

The first amendment to the constitution of the United States provides that congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; and in all the states there are constitutional provisions, varying in language, but all tending to secure to the citizen the entire freedom of his conscience. "The real object of the first amendment," says Story, "was not to countenance, much less to advance, Mahometanism or Judaism or infidelity, by prostrating Christianity, but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government. It thus cut off the means of religious persecution (the vice and pest of former ages), and of the subversion of the rights of conscience in matters of religion which had been trampled upon almost from the days of the Apostles to the present age. * * * But this alone would have been an imperfect security, if it had not been followed up by a declaration of the right of the free exercise of religion and a prohibition of all religious tests. Thus the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice and the state constitutions; and the Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the infidel, may sit down at the common table of the national councils without any inqui-

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sition into their faith or mode of worship."[2] It will be perceived that this amendment relates only to possible congressional action interfering with the liberty of conscience. It is not a limitation upon the power of the states, but only upon that of congress. If any state chose to establish a religion, it would not be contrary to the federal constitution. Whatever regulations the several states may see fit to make, either in extension or abridgment of the freedom of religion, they cannot be annulled by the national government or its courts.[3] But, as we have stated above, the constitutions of all the states make such provision on this subject as to secure the full measure of religious liberty which is deemed essential under American institutions and ideas.

Christianity as Part of the Law of the Land.

The statement that Christianity is part of the law of the land must be taken in a qualified and limited sense. It is incorrect if it means that the doctrines, precepts, and practices of the Christian religion are compulsory upon all citizens, in the same way as the statute laws or the unrepealed rules of the common law, or that those articles of faith and observance may be enforced by the legislature or the courts in the same manner and to the same extent as the positive enacted law. If the law demands obedience to any maxim or rule of Christianity, it is not because of its divine origin, but because that maxim or rule has been legally adopted as part of the municipal law. But the saying is true in this sense, that many of our best civil and social institutions, and the most important to be preserved in a free and civilized state, are founded upon the Christian religion, or upheld and strengthened by its observance; that the whole purpose and policy of the law assume that we are a nation of Christians, and while toleration is the principle in religious matters, the laws are to recognize the existence of that system of faith, and our institutions are to be based on that assumption; that those who are in fact Christians have a right to be protected by law against wanton interference with the free and undisturbed practice of their religion and against malicious attacks upon its source or authority, calculated and intended to affront and wound them; and that the prevalence of

[2] 2 Story, Const. §§ 1877, 1879.

[3] Permoli v. First Municipality, 3 How. 589.

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a sound morality among the people is essential to the preservation of their liberties and the permanence of their institutions, and to the success and prosperity of government, and the morality which is to be fostered and encouraged by the state is Christian morality, and not such as might exist in the supposititious "state of nature" or in a pagan country. The law does not cover the whole field of morality. Much that lies within the moral sphere does not lie within the jural sphere. But that which does lie within the jural sphere, and which is enforced by positive law, is Christian morality.[4]

Encouragement of Religion.

The constitutional provisions for liberty of conscience do not mean that religion shall not be encouraged by the state. In point of fact, it is not the encouragement of religion which is forbidden by the constitutions, but any such discrimination in that encouragement as may compel men to violate their consciences, in respect either to the choice of a mode of worship or the support of religious bodies by their contributions. "Government," says the court in Texas, "can hardly consider itself entirely free from the fostering care and protection of religion, as connected with the personal, social, and domestic virtues of its people; but to what extent government may go in the support and protection of religion, with safety and propriety, may be a subject of much contrariety of opinion with statesmen and publicists." [5]

Public Recognition of Religion.

From the foregoing principles it follows that there is no violation of religious liberty in the public recognition of religion, or in the observance of religious forms and ceremonies in public transactions and exercises, provided that no constraint is put upon the conscience of any individual. This rule is illustrated by the annual custom of proclaiming a day of general thanksgiving, and the occasional appointment of a day of fasting and public humiliation. On the same principle, there is no violation of religious liberty in including

[4] Zelsweiss v. James, 63 Pa. St. 465; Shover v. State, 10 Ark. 259; Vidal v. Girard, 2 How. 127; Andrew v. New York Bible Soc., 4 Sandf. 156; Hale v. Everett, 53 N. H. 9; State v. Chandler, 2 Har. (Del.) 553; People v. Ruggles, 8 Johns. 290; Rex v. Tayler, 3 Keb. 607.

[5] Gabel v. City of Houston, 29 Tex. 335.

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in the class of "legal holidays" such days as are regarded by a great portion of the people as sacred anniversaries, if no person is required by law to observe them according to any particular religious rites.

Bible in the Schools.

It has been held by some authorities that the laws of the state may imperatively require the reading of the Bible in the public schools, even when the attendance of the pupils at such reading is compulsory. But it is difficult to see why this may not be an infraction of due religious liberty in particular cases, and the answer that no one is compelled to send his children to the public schools is not satisfactory, because the practical exclusion of some, on account of religious beliefs, is equally inconsistent with our constitutions.[6] It is ruled, however, and with irrefragable reason, that a law providing that the Bible shall not be excluded from the public schools, but that no pupil shall be required to read it contrary to the wishes of his parent or guardian, is constitutional.[7]

Sunday Laws.

Laws requiring the observance of the first day of the week as a holiday, at least to the extent of forbidding all ordinary labor, trade, and traffic on that day, enforcing quiet upon the public streets, and directing the cessation of public amusements, such as theatrical exhibitions, and the closing of saloons and grog-shops, are universally in force in the states, and their constitutional validity is sustained by the decisions of the courts.[8] The grounds

[6] State v. District Board, 76 Wis. 177, 44 N. W. 967. See Tied. Police Power, 161.

[7] Board of Education of Cincinnati v. Minor, 23 Ohio St. 211; Nessle v. Hum, 1 Ohio N. P. 140. But denominational religious exercises and instruction in sectarian doctrine in the common schools are forbidden by the constitutional provisions under consideration. See Stevenson v. Hanyon, 16 Pa. Co. Ct. R. 186.

[8] Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. 730; In re King, 46 Fed. 905; Swann v. Swann, 21 Fed. 299; Judefind v. State, 78 Md. 510, 28 Atl. 405; State v. Judge of Section A, 39 La. Ann. 132, 1 South. 437; People v. Havnor, 149 N. Y. 195, 43 N. E. 541; Neuendorff v. Duryea, 69 N. Y. 557; Mayor of Nashville v. Linck, 12 Lea (Tenn.) 499; Langabier v. Railroad Co., 64 Ill. 243; Ex parte Koser, 60 Cal. 177; Gunn v. State, 89 Ga. 341, 15 S. E. 458; Ex parte Burke, 59 Cal. 6.

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on which the validity of Sunday laws may be sustained have been the subject of extended and earnest discussion. The subject is too large to be entered upon here. But we may briefly remark that the requirement of the observance of Sunday, if it is distinctly as a matter of religious principle, violates the religious liberty of the Jews and perhaps others. And if the physical necessity of an interval of rest at stated periods is urged as the ground (thus making Sunday laws a species of sanitary regulations), it must be answered that this does not justify the imposition of such a day of rest upon those who observe Saturday in that manner or any other day of the week. The fact is that the great majority of the American people are Christians, and the laws are made with reference to this fact. And although others may be put to inconvenience by laws of this kind, it is but an application of the principle that the wishes and preferences of the majority must govern. But such laws must be of universal application within the territory over which they extend and enforced without discrimination. For instance, a Sunday-closing law which allows Jews who observe the Sabbath to keep their places of business open on Sunday is invalid, because it gives to people of that religion a privilege which is denied to others.[9]

Blasphemy a Crime.

Laws defining and punishing blasphemy as a crime are not an unconstitutional interference with the freedom of the conscience and religious liberty. For the legal conception of this crime includes not only the use of impious language, but also a wanton and malicious intention on the part of the speaker to offend and affront Christian people and wound their susceptibilities. It is therefore not merely, nor mainly, an offense against religion, but an offense against individuals or a considerable portion of the entire community. And it is, for this reason, as much within the rightful cognizance of the criminal laws as is libel, or malicious injuries to property. All the best authorities sustain the validity of laws for the punishment of blasphemy.[10] But of course the laws

[9] City of Shreveport v. Levy, 26 La. Ann. 671.

[10] 2 Bish. Cr. Law, § 74; Reg. v. Bradlaugh, 15 Cox, Cr. Cas. 217; Com. v. Kneeland, 20 Pick. (Mass.) 206; People v. Ruggles, 8 Johns. (N. Y.) 290. Public profane swearing, when it takes such form, and is uttered under such

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against blasphemy do not interfere with the rightful liberty of speech or of the press, any more than with the freedom of conscience. That is to say, they do not include the candid and honest criticism of systems of religion, or of grounds, objects, or articles of religious faith, or the honest discussion of such subjects, when undertaken with sincere and justifiable motives and for proper ends. Thus in England it is held that a blasphemous libel does not consist in an honest denial of the truths of the Christian religion, but in a willful intention to pervert, insult, and mislead others by means of licentious and contumelious abuse applied to sacred subjects.[11]

Establishment of Religion Forbidden.

In many of the states the constitutions provide that no man shall be compelled, against his consent, to support or attend any church; in some, that there shall be no established church; and in several, that there shall be no preference shown to any one sect.[12] These provisions, together with the prohibition laid upon congress, furnish the guaranty against the establishment of a church or religion. A church is by law "established" in a state when it is an institution of the state, under the direct protection and patronage of the state, to the exclusion of other churches or sects, when it is supported by general and public taxation, when its laws, ordinances, and doctrines are a part of the municipal law of the state, so that persons may be punished by the civil authorities for disobedience of them, and when its chief officers are officers of the state or appointed by the civil authorities.

Taxation in Aid of Religion.

In a considerable proportion of the states, the constitutions provide that no money can be taken from the public treasury in aid of any church, sect, or sectarian institution. And in general, and even without constitutional prohibitions, the compulsory support, by taxation or the appropriation of public funds, of religious establishments or religious instruction, would be contrary to the principles of religious freedom and the rules of taxation.

circumstances, as to constitute a public nuisance, is an indictable offense at common law. Goree v. State, 71 Ala. 7; State v. Steele, 8 Heisk. (Tenn.) 185.

[11] Reg. v. Ramsay, 48 Law T. (N. S.) 733.

[12] Stim. Am. St. Law, p. 8, §§ 42, 43.

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Exemption from Taxation.

Although the state may not lawfully appropriate money to the support of religious institutions, it may lawfully exempt from all ordinary taxation the property of religious societies used by them for purposes of public worship. This may be done in the interests of religion and for the encouragement of it, as a factor in the inculcation of morality, just as a similar exemption may be granted to schools and colleges, in the interests of the spread of education, or to hospitals and asylums, in the interests of humanity. But there must be no discrimination in such exemption, either in favor of or against any sect or religious body.

Legal Status of Religious Societies.

No principle of the constitution is infringed by the incorporation of religious societies under general laws, and without discrimination, and the investing them with power to hold and possess property and otherwise to manage their business affairs. By such incorporation the society acquires a legal status, and in respect to its property and its business dealings with others, and to the rights of its members, considered as property rights, the courts may deal with it as with any other corporation. But the church, the spiritual organization, is not thereby incorporated. It is left to make its own rules, as to its membership and otherwise, and with its purely ecclesiastical affairs, and such matters as church discipline and forms of worship, the state and its courts have no concern whatever.[18]

Religion No Excuse for Crime.

In several of the states the constitutions provide that the guaranties of religious freedom are not to be held to excuse acts of licentiousness, or to justify practices inconsistent with the peace and safety of the state. Even without such provisions in the organic law, it would be clearly competent for the state to condemn and punish acts which are contrary to its policy and the established laws regulating the conduct of citizens, notwithstanding that a minority of the people professed a religion which tolerated or even commanded such acts. In other words, peculiarities of religious belief cannot be made a defense to prosecutions for breaches of the criminal laws. As a

[18] Feizel v. Trustees, 9 Kan. 592; Elder, etc., of First Baptist Church in Hartford v. Witherell, 3 Paige (N. Y.) 296.

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conspicuous illustration of this rule, we may cite the decisions of the federal supreme court in the Mormon cases, to the effect that, although the practice of polygamy was sanctioned by the religion of that people, yet that fact did not prevent congress from prohibiting and punishing it, as well as any other open offense against the enlightened sentiment of mankind.[14]

Respect for Conscientious Scruples.

It is a general principle, based on the rule of religious liberty, that no man's conscientious scruples should be violated by the laws, unless where the exigencies of government or of the state make it unavoidable.[15] Illustrations of this principle are seen in the almost universal rule which allows the substitution of a solemn affirmation, instead of an oath, where one is required to be taken, and also in those provisions in the constitutions of several of the states which exempt all persons from bearing arms in the public defense, or serving in the militia, who have conscientious scruples on the subject of the morality of war. Under a provision of this kind, a fine for not attending a militia muster cannot lawfully be imposed on such persons.[16]

Competency of Witnesses.

At the common law those persons only were competent to give evidence as witnesses in a court of law who believed in the existence of a Supreme Being who would punish false swearing. Without such belief, it was considered, there was no way of making the oath obligatory on the conscience of the witness.[17] In a considerable number of the states, this rule has been done away with by constitutional provisions that no religious test shall be required as a qualification of a witness. But in some the common law rule still remains in force. In those jurisdictions, it is held by the courts that the rejection of a

[14] Mormon Church v. U. S., 136 U. S. 1, 10 Sup. Ct. 792; Reynolds v. U. S., 98 U. S. 145; Murphy v. Ramsey, 114 U. S. 15, 5 Sup. Ct. 747; Davis v. Beason, 133 U. S. 333, 10 Sup. Ct. 299.

[15] Peculiar religious beliefs, though they may cause estrangement between man and wife, and introduce dissension in the family, cannot be made a ground for divorce. Haymond v. Haymond, 74 Tex. 414, 12 S. W. 90.

[16] White v. McBride, 4 Bibb (Ky.) 61.

[17] Omichund v. Barker, Willes, 538; Atwood v. Welton, 7 Conn. 66; Arnold v. Arnold's Estate, 18 Vt. 362.

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witness as incompetent, by reason of his want of religious belief, is not a violation of the principle of religious freedom.[18]

Religious Test as Qualification for Office.

In a majority of the states, the constitutions ordain that no religious test shall be required as a qualification, or condition of eligibility, for the holding of public office or any trust under the state. So also by the constitution of the United States, "no religious test shall ever be required as a qualification to any office or public trust under the United States." But this principle has not been universally adopted. It is still the constitutional rule in some of the states that no man can hold office who denies the existence of a Supreme Being. And on the other hand, in some few of the states, the fundamental law ordains that no minister or preacher of any religious denomination can be a member of the legislature, or (in Kentucky) hold the office of governor, or (in Delaware) hold any civil office.[19]

PERSONAL LIBERTY.

199. Personal liberty consists in the power of locomotion, of changing situation, of removing one's person to whatever place one's inclination may direct, without imprisonment or restraint unless by due course of law.[20]

200. This right is amply secured by guaranties in both the federal and the state constitutions. No one can be deprived of it except by due process of law.

201. But the right of personal liberty is limited, in accordance with law, in so far as may be necessary for—

(a) The preservation of the state and the due discharge of its functions.

(b) The securing of the rights of each member of the community against the others.

(c) The due regulation of the domestic relations.

Guaranties.

The fourteenth amendment to the federal constitution provides that no state shall deprive any person of life, liberty, or property

[18] Thurston v. Whitney, 2 Cush. (Mass.) 104.

[19] Stim. Am. St. Law, p. 54, § 223.

[20] 1 Bl. Comm. 134.

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without due process of law. And similar provisions are found in most of the state constitutions. Beside these specific guaranties, there are many which are designed to guard the right of personal liberty in particular aspects of it, or in particular relations, or against particular forms of aggression. For instance, the abolition of slavery and involuntary servitude is a provision which makes for personal liberty. So also is the prohibition against the passage of bills of attainder and that against ex post facto laws. Of the same nature is the humane provision of the constitutions admitting accused persons to bail in proper cases, and requiring that bail, when exacted, shall not be excessive. The same remark is true, though less directly, of those regulations of the mode of trial in criminal cases which give to the accused the benefit of the presumption of innocence and the right to be presented or indicted by a grand jury and to be tried by a petit jury of the vicinage. And the great safeguard of the right of personal liberty is the privilege of the writ of habeas corpus. All these guaranties are considered at large in other parts of this work

Limitations.

The limitations upon the right of personal liberty to be first considered are those having relation to the duties and needs of the state and the obligations of the citizen to the government and to other citizens. And first, the citizen may be restrained of his liberty by being put under arrest, in a lawful manner and by a person duly authorized, in order to prevent the commission of a public offense, or in order to bring him to trial for a crime with which he is charged. But the law requires as an almost invariable rule that the arrest shall be made upon a warrant duly issued by a lawful magistrate, and that it shall be served by an officer of the law. Any person found in the act of committing a felony or a breach of the peace with force may be arrested by any citizen without a warrant. An officer of the law may, without a warrant, arrest a person violating municipal ordinances in his presence, or on reasonable grounds of suspicion of felony.[21] But ar-

[21] 1 East, P. C. 298; Holley v. Mix, 3 Wend. (N. Y.) 350; Wade v. Chaffee, 8 R. I. 224; State v. Underwood, 75 Mo. 230; Mitchell v. Lemon, 34 Md. 176; Griffin v. Coleman, 4 Hurl. & N. 265. A peace officer may arrest for a breach

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rests without warrant are not by any means favored in the law, and any person making an arrest under such circumstances must at once take the person arrested before some magistrate or court of competent jurisdiction to inquire into the alleged offense, and must also show that the actual state of the case was such as to justify his action.[22]

In the next place, a man may be restrained of his liberty as a consequence of crime committed by him. But the principle of protection to personal liberty demands that imprisonment shall be decreed only after a fair and impartial trial, conducted according to the regular forms of judicial procedure, and a proper conviction. And even then the terms of the sentence must be strictly observed. Any detention of the prisoner after the expiration of the term for which he was sentenced, whether for breaches of prison discipline or other cause, is illegal.[23] Under this head we must also include imprisonment or detention as a punishment for contempts of court or of legislative bodies, or for contumacy defeating the operation of their lawful powers and jurisdiction.

In the next place, certain classes of persons may be restrained of their liberty, by due process of law, whose power to go at large, without restraint, would threaten the peace, security, or health of the community. These include maniacs and dangerous lunatics, persons affected with dangerous infectious diseases, vagabonds, and possibly some other classes. But these, no less than others, are protected by the requirement of due process of law. For example, it is held that a person supposed to be insane may not lawfully be committed to an asylum, at the instance of public authorities, against his will, without some sort of judicial investigation into the question of his sanity.[24] Vagabonds and paupers

of the peace committed against himself as well as for those committed against others. Davis v. Burgess, 54 Mich. 514, 20 N. W. 540.

[22] A statute conferring authority on police officers to make arrests without a warrant, for misdemeanors not committed in view of the officer, and merely upon suspicion, is unconstitutional and void. In re Kellam, 55 Kan. 700, 41 Pac. 960; Pinkerton v. Verberg, 78 Mich. 573, 44 N. W. 579.

[23] Gross v. Rice, 71 Me. 241; Knox v. State, 9 Baxt. (Tenn.) 202.

[24] State v. Billings, 55 Minn. 467, 57 N. W. 794; Van Deusen v. Newcomer, 40 Mich. 90.

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may be committed, by those duly authorized, to public work-houses, infirmaries, and other similar institutions.[25] Due process of law in such cases does not always require a trial by jury. But in some form due process of law must be employed, or such commitments are illegal.[26] Another ground of limitation upon the right of personal freedom is that which is described as being necessary to enforce the duty which citizens owe in defense of the state. This power of the state can have but few applications in practice, but those are highly important. The most conspicuous is the right to compel citizens, by draft or conscription, to serve in its armies in time of war.

The second class of limitations upon the right of personal liberty includes such as are rendered necessary by the helpless, dependent, or immature condition of those persons to whom they apply. These limitations are not imposed by the state, but are recognized and allowed by its laws. They depend, as a rule, on the constitution of the family, or on relations analogous thereto. This class includes the lawful control of a parent over the liberty of his children, of a guardian over that of his ward, of a master over his apprentice, of a teacher over his pupil. In this category belongs also the common law power of a husband over his wife. But as this has been reduced, by the progress of enlightened opinion and the gradual emancipation of women, to a minimum, it scarcely requires mention in this connection. There are some few anomalous conditions in which one person has the right to put restraint upon the liberty of another, which belong in this class of limitations, but do not depend on the domestic relations. Thus, parties who have become bail for another in legal proceedings are regarded in law as his friendly jailers, and they have a legal right to have the custody of him, for the purpose of delivering him up to the officers of justice in due time. Creditors had the power to put restraint upon the liberty of their debtors so long as

[25] But a city ordinance which forbids any one knowingly to associate with persons having the reputation of being thieves, burglars, etc., for the purpose or with the intent to agree to commit any offense, is unconstitutional, because it invades the right of personal liberty. Ex parte Smith (Mo. Sup.) 36 S. W. 628.

[26] City of Portland v. City of Bangor, 65 Me. 120.

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laws authorizing imprisonment for debt remained upon our statute books. But these laws have been now almost universally abolished, and except in a few states, in cases of fraud, no such deprivation of personal liberty can be used as a means of collecting a mere civil debt.

ABOLITION OF SLAVERY.

202. The constitution of the United States, in the thirteenth amendment, forever abolishes and prohibits slavery, or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, throughout the United States and all places subject to their jurisdiction.

The constitution originally recognized the existence of slavery as a fact, though referring to it in obscure and guarded terms. Congress was authorized to forbid the further importation of slaves after the year 1808, and provision was made for the surrender of fugitive slaves. In this respect, the constitution differed from the contemporary law of England, where it had been recently declared from the bench that slavery was repugnant to the common law, that a slave brought into England by his master was by that mere fact emancipated, and that a person forcibly detained on English soil as a slave was entitled to be discharged on habeas corpus.[27] It was not considered that the federal government had any power to interfere with the institution of slavery. It was regarded as a matter wholly of domestic concern within each state. As to the status of the slave, he was regarded as a chattel and the absolute property of his master. "The power of the master," said the court in North Carolina, "must be absolute, to render the submission of the slave perfect. We cannot allow the right of the master to be brought into discussion in the courts of justice. The slave, to remain a slave, must be made sensible that there is no appeal from his master; that his power is in no instance usurped, but is conferred by the laws of man at least, if not by the law of God." [28]

[27] Sommersett's Case, 20 How. St. Tr. 1; Broom, Const. Law, 59.

[28] State v. Mann, 2 Dev. (N. C.) 263.

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But the emancipation of the slaves was effected by executive proclamation, during the continuance of the civil war, and was made real by the armies of the north in their progress through the insurgent territory. Then came the thirteenth amendment, which assured its perpetual abolition throughout all the domain of the United States.

The language of the amendment is plain, and has called for but little interpretation at the hands of the courts. The only controversy has been as to the meaning of the phrase "involuntary servitude." It was probably added to guard against the establishment of any species of compulsory service, which might differ from perpetual slavery only in its restriction to a term of years. But it was then necessary to make an exception, allowing such involuntary servitude as a punishment for crime, in order not to deprive the states of the power to sentence convicts to labor in the penitentiaries. In this connection, doubt may arise as to the validity of what is known as the "convict lease system," in vogue in some of the states, by which the labor of convicts is let out to private contractors who are to employ them in or near the prison and under the superintendence of its officers. But the validity of such laws has not been successfully impugned. It is said: "The state acquires an ownership in the services of all persons convicted of crime, and duly sentenced therefor to confinement in the penitentiary, which, guarded by certain humanitarian principles, is treated and protected as a valuable property." [29] Although the thirteenth amendment would not invalidate indentures of apprenticeship as that system obtained at common law, yet an act of congress passed in 1874 made it a felony to import into the United States any person inveigled, kidnapped, or sold into involuntary service with intent to hold such person in confinement or to involuntary labor. This act was principally directed against the "padrone system," practiced chiefly in Italy, by which children were bought to serve as street musicians and beg-

[29] Comer v. Bankhead, 70 Ala. 493. And see Mason & Foard Co. v. Main Jellico Mountain Coal Co., 87 Ky. 467, 9 S. W. 391. But a statute authorizing a "vagrant," even though not accused or convicted of any crime, to be hired for six months to the highest bidder, contravenes the provisions of the constitutions in respect to involuntary servitude. In re Thompson, 117 Mo. 83, 22 S. W. 863.

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gars, and ignorant laborers decoyed into selling their freedom and labor for a term of years. Its validity has been sustained, and it is well in accordance with the spirit and the terms of the thirteenth amendment.[30] But the performance of work upon an assessment or levy payable in labor for the repair of roads and streets is not that kind of involuntary servitude intended by the constitution.[31] And it is held that a statute providing that if a laborer, willfully and without just cause, fails to give the labor reasonably required of him by the terms of his contract, or in other respects shall refuse to comply with the conditions of his contract, he shall be liable to fine or imprisonment, is not repugnant to this provision of the constitution.[32]

It should be noticed that the thirteenth amendment is not restricted in its prohibitions to any race or class of people. Its terms are general. "Neither slavery nor involuntary servitude" shall exist. And consequently, as remarked by the supreme court, "while negro slavery alone was in the mind of the congress which proposed the thirteenth article [amendment] it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese cooly labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void." [33] A custom or rite prevailing among the uncivilized tribes of Indians in Alaska, whereby slaves are bought, sold, and held in servitude, against their free will, and subjected to ill treatment at the pleasure of the owner, is contrary to the thirteenth amendment, and a person so held in slavery will be released by order of the court on habeas corpus.[34]

RIGHT TO BEAR ARMS.

203. The second amendment to the federal constitution, as well as the constitutions of many of the states, guaranty to the people the right to bear arms.

[30] U. S. v. Ancarola, 1 Fed. 676.
[31] In re Dassler, 35 Kan. 678, 12 Pac. 130.
[32] Ex parte Williams, 32 S. C. 583, 10 S. E. 551.
[33] Slaughterhouse Cases, 16 Wall. 36, Miller, J.
[34] In re Sah Quah, 31 Fed. 327.

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This is a natural right, not created or granted by the constitutions. The second amendment means no more than that it shall not be denied or infringed by congress or the other departments of the national government. The amendment is no restriction upon the power of the several states.[35] Hence, unless restrained by their own constitutions, the state legislatures may enact laws to control and regulate all military organizations, and the drilling and parading of military bodies and associations, except those which are authorized by the militia laws or the laws of the United States.[36] The "arms" here meant are those of a soldier. They do not include dirks, bowie knives, and such other weapons as are used in brawls, fights, and riots. The citizen has at all times the right to keep arms of modern warfare, if without danger to others, and for purposes of training and efficiency in their use, but not such weapons as are only intended to be the instruments of private feuds or vengeance.[37] The right to bear arms is not infringed by a state law prohibiting the carrying of concealed deadly weapons. Such a law is a police regulation, and is justified by the fact that the practice forbidden endangers the peace of society and the safety of individuals.[38]

THE PURSUIT OF HAPPINESS.

204. All men are invested with a natural, inherent, and inalienable right to the pursuit of happiness.

This principle is formally declared in the constitutions of many of the states. And moreover the framers of the Declaration of Independence announced that they "held these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness." This latter expression is one of a general nature, and the right thus secured is not capable of

[35] U. S. v. Cruikshank, 92 U. S. 542.

[36] Presser v. Illinois, 116 U. S. 252, 6 Sup. Ct. 580; Com. v. Murphy (Mass.) 44 N. E. 138.

[37] English v. State, 35 Tex. 473; Fife v. State, 31 Ark. 455; State v. Workman, 35 W. Va. 367, 14 S. E. 9.

[38] State v. Wilforth, 74 Mo. 528; Haile v. State, 38 Ark. 564; Wright v. Com., 77 Pa. St. 470; State v. Speller, 86 N. C. 697.

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specific definition or limitation, but is really the aggregate of many particular rights, some of which are enumerated in the constitutions, and others included in the general guaranty of "liberty." The happiness of men may consist in many things or depend on many circumstances. But in so far as it is likely to be acted upon by the operations of government, it is clear that it must comprise personal freedom, exemption from oppression or invidious discrimination, the right to follow one's individual preference in the choice of an occupation and the application of his energies, liberty of conscience, and the right to enjoy the domestic relations and the privileges of the family and the home. The search for happiness is the mainspring of human activity. And a guarantied constitutional right to pursue happiness can mean no less than the right to devote the mental and physical powers to the attainment of this end, without restriction or obstruction, in respect to any of the particulars just mentioned, except in so far as may be necessary to secure the equal rights of others. Thus it appears that this guaranty, though one of the most indefinite, is also one of the most comprehensive to be found in the constitutions.

EQUAL PROTECTION OF THE LAWS.

205. By the terms of the fourteenth amendment to the federal constitution, the states are forbidden to deny to any person within their jurisdiction the equal protection of the laws.

Meaning of the Phrase.

If the word "protection" were to be taken in a strict sense, it could mean no more than the right to call to one's aid the laws of the state, attended by all their machinery of justice, for the averting or redress of injuries or oppressions. It would confer no rights, but only guaranty remedies. But it is held that the amendment must be liberally construed, according to its spirit and purpose. The supreme court, quoting the words of the amendment, says: "What is this but declaring that the law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states, and, in regard to the colored race, for whose protection the amendment was primarily

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designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race, the right to exemption from unfriendly legislation against them distinctively as colored, exemption from legal discriminations implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."[39]

What Persons Protected.

While it is true that the fourteenth amendment was primarily intended to secure the rights, and the equality before the law, of the colored race, yet its terms are so broad as to guaranty these advantages to any person, of any class or race, against whom the laws of a state may make invidious discriminations. No state shall deny to "any person within its jurisdiction" the equal protection of the laws. Hence it may be invoked by whites as well as blacks, by Chinese or Japanese, or by any other persons within the jurisdiction of the state, without regard to color or place of original nationality. It is not even restricted to American citizens. It may be claimed as a protection by aliens lawfully resident within the state, if "within its jurisdiction."[40] And moreover it is held that the word "person," as here used, includes corporations.[41]

Civil Rights Acts.

The fourteenth amendment gives to congress the power to enforce its provisions by appropriate legislation. In pursuance of this authority, congress, in 1875, passed an act, commonly called the "Civil Rights Act," whereby it was provided that "all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regard-

[39] Strauder v. West Virginia, 100 U. S. 303.

[40] Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064.

[41] Santa Clara Co. v. Southern Pac. R. Co., 118 U. S. 394, 6 Sup. Ct. 1132.

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less of any previous condition of servitude." But this statute was adjudged unconstitutional and void, in so far as it applied to the states generally, and was not restricted to the places over which congress has the power of direct legislation. The reason of this decision was this: The legislation authorized to be adopted by congress for enforcing the fourteenth amendment is not direct and primary legislation on the matters respecting which the states are prohibited from making or enforcing certain laws, or doing certain acts, but is corrective legislation, such as may be necessary or proper for counteracting or redressing the effect of such laws or acts. The amendment simply furnishes an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society. The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the state, and it still remains there. The only obligation resting upon the United States is to see that the states do not deny the right. This the amendment guaranties, but no more. The power of the national government is limited to the enforcement of this guaranty.[42]

Civil rights statutes have also been enacted in several of the states. They provide generally that there shall be no exclusion or discrimination against citizens of the state, on account of race, color, or previous condition of servitude, in respect to their equal enjoyment of the accommodations, privileges, or facilities furnished by railroads or other carriers, inn-keepers, proprietors of theatres and other places of amusement, teachers and officers of public schools, etc. These laws are sustained as valid and constitutional enactments. They are not regarded as unlawfully interfering with private rights of property.[43]

[42] Civil Rights Cases, 109 U. S. 3, 3 Sup. Ct. 18; U. S. v. Cruikshank, 92 U. S. 542. See, also, U. S. v. Newcomer, 11 Phila. 519, Fed. Cas. No. 15,868; U. S. v. Rhodes, 1 Abb. (U. S.) 28, Fed. Cas. No. 16,151; Ex parte Turner, Chase, 157, Fed. Cas. No. 14,247.

[43] People v. King, 110 N. Y. 418, 18 N. E. 245; Donnell v. State, 48 Miss. 661; Joseph v. Bidwell, 28 La. Ann. 382; Ferguson v. Gies, 82 Mich. 358, 46 N. W. 718; Baylies v. Curry, 128 Ill. 287, 21 N. E. 595.

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Local or Special Laws not Prohibited.

This provision of the constitution does not require absolute uniformity of laws and judicial administration throughout the state, provided that all persons who are subject to the same laws enjoy the benefit of them equally. "If diversities of laws and judicial proceedings may exist in the several states without violating the equality clause in the fourteenth amendment, there is no solid reason why there may not be such diversities in different parts of the same state. A uniformity which is not essential as regards different states cannot be essential as regards different parts of a state, provided that in each and all there is no infraction of the constitutional provision. Diversities which are allowable in different states are allowable in different parts of the same state. Where part of a state is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions,—trial by jury in one, for example, and not in the other. Large cities may require a multiplication of courts and a peculiar arrangement of jurisdictions. It would be an unfortunate restriction of the power of the state government if it could not, in its discretion, provide for these various exigencies." [44] "When legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions." [45] Hence this provision is not violated by regulations regarding railroads, designed to promote the public safety and comfort, if such regulations apply to all railroads alike which are subject to the laws of that state.[46]

[44] Missouri v. Lewis, 101 U. S. 22. And see Rothermel v. Meyerle, 136 Pa. St. 250, 20 Atl. 583. A statute providing that in all capital criminal cases, except in cities having a population of over 100,000, the state shall be allowed eight peremptory challenges to jurors, and in such cities shall be allowed fifteen, is not unconstitutional as denying to persons charged with capital crimes in such cities the equal protection of the laws. All persons in those cities are treated alike, and all persons out of those cities are treated alike, and this is all the constitutional provision requires. Hayes v. Missouri, 120 U. S. 68, 7 Sup. Ct. 350.

[45] Missouri Pac. R. Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161.

[46] New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 14 Sup. Ct. 437.

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Tax Laws.

A state law for the valuation and assessment of property for taxation, which provides for the classification of property subject to its provisions into different classes, which makes for one class one set of provisions as to the modes and methods of ascertaining the value and as to the right of appeal, and different provisions for another class as to these subjects, but which provides for the impartial application of the same means and methods to all constituents of each class, so that the law shall operate equally and uniformly on all persons in similar circumstances, cannot be said to deny to any person affected by it the equal protection of the laws.[47] The imposition of a special tax upon railroad companies exclusively, the proceeds of which are to pay the salaries and expenses of the state board of railroad commissioners, does not deprive such companies of the equal protection of the laws.[48]

Competency of Witnesses.

It has been held that a state statute providing that no Indian, Mongolian, or Chinese shall be permitted to give evidence in the courts of the state in favor of or against a white man is not in violation of the federal constitution, even since the thirteenth and fourteenth amendments. To declare who shall be competent to testify in the state courts was always considered, prior to those amendments, a subject within the legitimate sphere of the state legislatures, and the restrictions which they impose upon the states relate to substantial personal rights of liberty and property, and do not extend to mere rules of evidence.[49]

Right to Labor.

But a state statute providing that no corporation organized under its laws shall directly or indirectly, in any capacity, employ any Chinese or Mongolian laborer, is unconstitutional. For the right to labor is clearly included within the scope of those rights which the amendment is designed to secure.[50]

[47] Kentucky Railroad Tax Cases, 115 U. S. 321, 6 Sup. Ct. 57; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 10 Sup. Ct. 533; Columbus Southern R. Co. v. Wright, 151 U. S. 470, 14 Sup. Ct. 396.

[48] Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 12 Sup. Ct. 255.

[49] People v. Brady, 40 Cal. 198.

[50] In re Parrott, 6 Sawy. 349, 1 Fed. 481.

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Discriminations against Colored Citizens.

It is to be carefully borne in mind that it is not identity of rights and privileges which this amendment guaranties, but equality. Hence, for example, while it would not be competent for the legislature of a state, in establishing and prescribing regulations for the public schools, to exclude negro children from the benefit of the public school system on account of their color only,[51] yet the state may establish separate public schools for colored children, and require them to attend those schools or none, provided the accommodations, advantages, and opportunities, and the relative appropriation of the public funds for their support, are in all respects equal to those provided for white children.[52]

Any state statute which denies to colored citizens the right or privilege of participating in the administration of the laws by serving on grand or petit juries, because of their race or color, is a discrimination against them which is forbidden by the fourteenth amendment.[53] But a mixed jury in any particular case is not essential to the equal protection of the laws. It is a right to which any colored man is entitled that, in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race and no discrimination against them because of their color. But that is a different thing from a right to have a jury composed in part of colored men.[54]

It is lawful for a railroad company, or other common carrier, to provide separate carriages or other separate accommodations for different classes of patrons, where the distinction is founded on some reasonable ground and there is no invidious discrimination against any, and there are equally desirable accommodations for all who pay at the same rate. Thus a distinction may be made, in railroad

[51] Davenport v. Cloverport, 72 Fed. 689.

[52] Claybrook v. City of Owensboro, 16 Fed. 297; McMillan v. School Committee, 107 N. C. 609, 12 S. E. 330; Knox v. Board of Education, 45 Kan. 152, 25 Pac. 616; Dallas v. Fosdick, 40 How. Prac. (N. Y.) 249; State v. Gray, 93 Ind. 303; Maddox v. Neal, 45 Ark. 121; Lehew v. Brummell, 103 Mo. 546, 15 S. W. 765; Chrisman v. City of Brookhaven, 70 Miss. 477, 12 South. 458.

[53] Strauder v. West Virginia, 100 U. S. 303; Ex parte Virginia, Id. 339.

[54] Virginia v. Rives, 100 U. S. 313; Neal v. Delaware, 103 U. S. 370.

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cars and waiting rooms, between men and women or between negroes and white people.[55]

A statute declaring the intermarriage of a negro and a white person illegal, or a nullity, or a felony, is not inconsistent with, or repugnant to, the provisions of the fourteenth amendment. Such a law cannot be said to deny to any person the equal protection of the laws.[56] And the same is true of an act providing a greater punishment for adultery between a white person and a negro than for adultery between those of the same race. This is not a discrimination against any particular race, but simply provides a penalty for an offense which could only exist when the parties were of different races.[57]

Foreign Corporations.

This provision does not prohibit a state from imposing an annual license tax, or other conditions, upon the admission of foreign corporations to do business within its limits. The reason is that the "person" to whom the equal protection of the laws is guarantied must be "within the jurisdiction" of the state. A corporation is a person and may fulfill this requisite. But a foreign corporation, seeking to do business within the state, is not "within the jurisdiction" until it has complied with the conditions imposed by the state as a pre-requisite to the right of such corporations to enter its field. Until this is done, therefore, the corporation cannot claim the benefit of the equal protection of the state's laws.[58]

[55] Plessy v. Ferguson, 163 U. S. 537, 16 Sup. Ct. 1138; Houck v. Railway Co., 38 Fed. 226; The Sue, 22 Fed. 843; Logwood v. Railroad Co., 23 Fed. 318; Murphy v. Railroad Co., Id. 637; Chicago & N. W. Ry. Co. v. Williams, 55 Ill. 185; Britton v. Railway Co., 88 N. C. 536.

[56] State v. Bell, 7 Baxt. (Tenn.) 9; Francois v. State, 9 Tex. App. 144; Dodson v. State, 61 Ark. 57, 31 S. W. 977; State v. Hairston, 63 N. C. 451.

[57] Pace v. Alabama, 106 U. S. 583, 1 Sup. Ct. 637.

[58] Pembina Con. Silver Mining & Milling Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737; Philadelphia Fire Ass'n v. People of New York, 119 U. S. 110, 7 Sup. Ct. 108; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 10 Sup. Ct. 958.

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RIGHT TO CHOOSE OCCUPATION.

206. The right of every man to choose his own occupation, profession, or employment, though not expressly guarantied by the constitutions, is included in the right to the pursuit of happiness.

207. But, for the welfare of society, the conduct of certain kinds of business, or the qualifications of those who shall be allowed to pursue them, may be regulated by the state in the exercise of the police power.

208. In many of the states, the constitutions forbid the grant of monopolies or exclusive privileges.

"Among these inalienable rights, as proclaimed in that great document [the Declaration of Independence], is the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give them their highest enjoyment. The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must therefore be free in this country to all alike upon the same conditions. The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright." [59] To secure this right, it is necessary that there should be no distinction or discrimination, in the laws of the state, as to the persons who may pursue given callings, except such as may be founded on and justified by the power of police. The rights of all citizens in this matter are equal. No discrimination, for instance, could lawfully be made between citizens founded solely on race or color. But the state, as

[59] Butchers' Union Slaughterhouse Co. v. Crescent City Live-Stock Landing Co., 111 U. S. 746, 4 Sup. Ct. 652, opinion of Field, J. And see Leep v. Railway Co., 58 Ark. 407, 25 S. W. 75.

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above remarked, may limit the right of employment so far as may be necessary in the exercise of the police power. This principle has been fully explained in the chapter specially devoted to that power of the government, and the reader is referred thereto for more specific details.

A part of the right to choose one's occupation is the right to be free from unlawful interference or control in the conduct of it. But here, as before, we find the state invested with a certain regulative power which is to be exercised for the benefit of the whole community. This also has been explained in the chapter just referred to. Moreover, in respect to some few occupations, either immemorial custom or the necessities of society have given to the state the right to regulate them in respect to other matters than the right to engage in them and the fixing of charges. Thus, common carriers, and particularly railroad companies, are so far under the control of the state that it may not only fix their rates for transportation, but also subject them to the supervision of a commission, fix their liability for damages done, regulate the acquisition and management of their right of way, the grade and crossings of their road, and the speed of their trains, and require them to furnish equal and impartial accommodations for all their patrons.[60] And the business of an inn-keeper is one where the public nature of the occupation prevents the individual from enjoying the same liberty in the conduct of his business which is accorded to other trades more private in their character. At common law, "an inn-keeper is bound, as a servant of the public, as one who exercises a public vocation, to lodge and entertain, to the extent of his accommodations, all suitable persons who may apply. And he cannot, if he has rooms enough in his house, refuse, on any pretense, to receive one as a guest who tenders him his reasonable recompense therefor, * * * though it would be open to him to refuse his entertainment on any reasonable grounds, as, for instance, that his house was full. * * * But it is a reasonable excuse for an inn-keeper to allege that the person came to the inn drunk, or behaved in an indecent or disorderly manner, or was an utterly disreputable and irresponsible person, or

[60] Chicago, B. & Q. R. Co. v. Iowa, 94 U. S. 155; Decuir v. Benson, 27 La. Ann. 1.

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came to use the house for prostitution, and hence was not admitted." [61]

Monopolies and Exclusive Privileges.

Although some of the British sovereigns claimed the right to grant monopolies and special privileges, and derived a large part of their revenue from the sale of such concessions, grossly infringing the liberties of the subject and demoralizing various branches of commerce thereby, the courts always maintained that such grants were illegal by the common law, and finally this branch of the royal prerogative was very materially curtailed by an act of parliament.[62] The grant of exclusive privileges with respect to any business or occupation to one man or set of men is necessarily in conflict with the constitutional right of all others to choose their own pursuits, and is, in this country, very generally prohibited. In a well-known case before the supreme court of the United States, three of the judges expressed the opinion that a grant by a state legislature of a monopoly in any of the ordinary and common trades or callings would be void under the federal constitution; for it would violate the provisions of the fourteenth amendment by abridging the privileges and immunities of citizens of the United States, and depriving them of a portion of their liberty (the right to pur-

[61] Schouler, Bailm. § 318. And see Hale, Bailm. & Carr. 274–277.

[62] "During the reign of Elizabeth, it was the policy of the crown to raise as little revenue as possible by direct taxation, and as much as possible by the sale of monopolies. In the forty-fourth year of her reign [1601] the burdens borne by the nation through this method of indirect taxation had become so intolerable that they produced an outbreak in parliament." McKeever v. U. S., 14 Ct. Cl. 418. Thereupon the queen made some concessions and allayed the popular complaints. But in the next year (1602) the Case of Monopolies (Darcy v. Allein, 11 Coke, 84b) came up. In this case the plaintiff claimed under letters patent from the crown granting to him the sole and exclusive right to make, import, and sell playing cards for a period of twelve years. It was unanimously resolved by the court that the said grant to the plaintiff of the sole making of cards within the realm was utterly void, because it was a monopoly and against the common law. And not long afterwards an act of parliament (St. 21 Jac. I., c. 8, § 1) declared all monopolies to be contrary to the laws of the realm, and to be utterly void and of no effect, saving patents for inventions, and except as to patents concerning printing and the manufacture of saltpetre, gunpowder, cannon, and shot. This statute, it will be observed, in its main feature, was only declaratory of the common law.

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sue their happiness in the prosecution of a lawful calling) without due process of law, and denying to them the equal protection of the laws.[63] But this has never been the opinion of a majority of the court.[64] However this may be, in most of the several states we find restrictions upon the grant or creation of monopolies. In some, the prohibition is leveled against "monopolies and perpetuities" by name, which are declared to be "odious" and forever forbidden. In some, the legislature is prohibited from granting to any citizen or class of citizens any "special privileges or immunities which shall not, upon the same terms, belong to all citizens." In others, the constitution contains a declaration that "no man or set of men are entitled to exclusive or separate public emoluments or privileges from the community but in consideration of public services."[65]

But yet there are reasons of public policy which will justify the grant of monopolies (unless specifically prohibited by the constitution) in many cases. Certain kinds of enterprise can be undertaken only by those who are able to command large capital. Certain others can be effectively managed only when the privileges are exclusive. Others again are of little value to the originator unless he may possess a monopoly. If in these cases the business is of such a nature that the community has an interest in its existence, and if the interests of the public can be best subserved by placing the business exclusively in the hands of an individual or corporation, these considerations will justify the closing of that business to all others.[66] Thus, for instance, a legislative grant of

[63] Butchers' Union Slaughterhouse Co. v. Crescent City Live-Stock Landing Co., 111 U. S. 746, 763, 4 Sup. Ct. 652. And see Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughterhouse Co., 1 Abb. (U. S.) 388, Fed. Cas. No. 8,408.

[64] See Slaughterhouse Cases, 16 Wall. 86.

[65] See Stim. Am. St. Law, §§ 17, 404.

[66] See Gordon v. Association, 12 Bush (Ky.) 110. And see East India Co. v. Sandys, 10 How. St. Tr. 371. In this case (called the "Great Case of Monopolies," and decided in 1683) was sustained the validity of the royal grant to the East India Company of the sole privilege of trading to the East Indies. One of the judges (Withins) said: "A monopoly is no immoral act, but only against the politic part of our law, which if it happen to be of advantage to the public, as this trade is, then it ceases also to be against the prohibiting part of the law, and so not within the law of monopolies."

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an exclusive right to supply gas to a municipality, through pipes and mains laid in the public streets, upon condition of the performance of the service by the grantee, is not a monopoly of the sort against which the constitutional prohibitions are directed, but a grant of a franchise vested in the state, and, after performance by the grantee, becomes a contract which the state may not impair.[67] On the same principle, an exclusive privilege to a city to erect and maintain waterworks is no monopoly; and granting the same exclusive privilege for a term of years to a private corporation does not render it a monopoly.[68] Again, under proper legislative authority, a city may grant to a street-railroad company the exclusive right to lay and operate its tracks in the streets of the city for a term of years.[69] And the grant of an exclusive right to build and maintain a toll bridge, or a ferry, or a turnpike road is not one of the monopolies reprobated and forbidden by the law.[70] The same is also true of an act giving to a butchering company the exclusive right for a term of years to slaughter cattle for a populous city.[71] And so, a law providing for the granting of permits, to persons of good moral character, who are citizens of the state or county, to sell intoxicating liquors, is not in conflict with the constitutional provisions under consideration.[72] And it has always been considered, from the earliest times, that the granting of pat-

[67] New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Manuf'g Co., 115 U. S. 650, 6 Sup. Ct. 252. And see, also, State v. Milwaukee Gaslight Co., 29 Wis. 460; Crescent City Gaslight Co. v. New Orleans Gaslight Co., 27 La. Ann. 138; Louisville Gas Co. v. Citizens' Gaslight Co., 115 U. S. 683, 6 Sup. Ct. 265; Saginaw Gaslight Co. v. City of Saginaw, 28 Fed. 529.

[68] City of Memphis v. Memphis Water Co., 5 Heisk. (Tenn.) 495; New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 6 Sup. Ct. 273; Atlantic City Waterworks Co. v. Atlantic City, 39 N. J. Eq. 367.

[69] Des Moines St. R. Co. v. Des Moines B. G. St. Ry. Co., 73 Iowa, 513, 33 N. W. 610; Indianapolis Cable St. R. Co. v. Citizens' St. R. Co., 127 Ind. 369, 24 N. E. 1054.

[70] Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 11 Pet. 420.

[71] Butchers' Union Slaughterhouse Co. v. Crescent City Live-Stock Landing Co., 111 U. S. 746, 4 Sup. Ct. 652; Slaughterhouse Cases, 16 Wall. 36.

[72] In re Ruth, 82 Iowa, 250; Thomasson v. State, 15 Ind. 449; Black, Intox. Liq. § 49.

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ents for inventions and copyrights on books was a case of a lawful and permissible monopoly.[73]

The power to grant monopolies does not appertain to a municipal corporation unless upon express grant. "A municipal corporation can grant, if at all, exclusive privileges for the protection of business which, without prohibitory legislation, would be free to all men, only under express legislative grant of power. Monopolies being prejudicial to the public welfare, the courts will not infer grants thereof, refusing to presume the existence of legislative intention in conflict with public policy."[74] As we have already seen, laws against the formation of trusts or monopolies are generally sustained as valid and constitutional. For instance, a state constitution or statute prohibiting the consolidation of a railroad with a parallel or competing road is a valid exercise of the police power.[75]

MARRIAGE AND DIVORCE.

209. The right to enter into the relation of marriage is a natural right. But in the interests of society, it may be regulated, and to a proper extent limited, by law. For the same reason, the dissolution of the marriage relation, during the life of the parties, can take place only in accordance with general public laws.

Marriage is not a mere contract, but it creates a status. It is for the interest of the state that marriages should take place and be fruitful, but not that they should be had between unfit persons or those who would be likely to inflict upon the community a helpless, feeble, or demoralized progeny. For this reason, it is competent for the state to prohibit the intermarriage of persons

[73] Butchers' Union Slaughterhouse Co. v. Crescent City Live-Stock Landing Co., 111 U. S. 746, 763, 4 Sup. Ct. 652.

[74] Logan v. Pyne, 43 Iowa, 524. And see Davenport v. Kleinschmidt, 6 Mont. 502, 13 Pac. 249; Mayor, etc., of Hudson v. Thorne, 7 Paige (N. Y.) 261; State v. Cincinnati Gaslight & Coke Co., 18 Ohio St. 262; Saginaw Gaslight Co. v. City of Saginaw, 28 Fed. 529; Minturn v. Larue, 23 How. 435; Citizens' Gas & Mining Co. v. Town of Elwood, 114 Ind. 332, 16 N. E. 624; Carroll v. Campbell, 108 Mo. 550, 17 S. W. 884.

[75] Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 16 Sup. Ct. 714.

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standing in a near degree of consanguinity, persons who have not attained a sufficient age, and those who are mentally afflicted or diseased. Moreover, while it would probably not be competent for the state to require any particular religious form or ceremony to be observed in the formation of the marriage relation, it is undoubtedly proper to establish such rules (as to the obtaining of a license, the registration of marriages, and the like,) as will tend to guard against improvidence in assuming the responsibilities of that estate, and against fraud, and also to secure publicity, certainty, and official evidence. And since marriage is not a mere civil contract, it follows that it cannot be dissolved at the will of the parties. The interest which the state has in this status, and in its preservation, gives it the right to prescribe general and uniform laws enumerating the causes for which divorces may be granted and regulating the procedure thereon.

SUMPTUARY LAWS.

210. Sumptuary laws, in general, are not only utterly foreign to the spirit of our institutions, but they are inconsistent with the guaranties of personal liberty and the right of property. Laws partaking of the nature of sumptuary laws, however, may be passed in the lawful exercise of the police power of the state.

Sumptuary laws are laws made for the purpose of restraining luxury or extravagance, particularly against inordinate expenditures in the matter of apparel, food, furniture, etc. They are odious in character, and contrary to the principle of liberty which assures to each the right to so use and dispose of his own property as shall seem best to him, provided he does not infringe upon the rights of others. Very few instances of an attempt to make or enforce such laws are recorded in our judicial annals. But the police power of the state authorizes it to enact laws which shall restrain the citizen from making such use of his property or his liberty as may be injurious to the public safety, health, or morals. For instance, the restrictions upon the manufacture and sale of intoxicants, if they are to be regarded as in any sense sumptuary laws, are nevertheless valid as made in the exercise of this power.

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EDUCATION.

211. In most of the American states, the right to acquire education is recognized by the constitutions as a civil right, which it is the duty of the state to preserve and protect.

This recognition of the right of education is effected by provisions in the constitutions declaring that, as the general diffusion of knowledge and intelligence is essential to the preservation of the rights and liberties of the people, it shall be the duty of the legislature to encourage the promotion of learning, or by similar provisions.[76] Almost without exception, the state constitutions require the legislature to provide a system of free schools, and in many of the states a school fund is provided by the constitution to be used for that purpose. In eighteen of the states, the constitution provides for a state university.[77] But, as a rule, these instruments also provide that no public money shall ever be appropriated for the support of any sectarian or denominational school. In some cases the constitution authorizes the legislature to make laws for the compulsory attendance of children at the public schools. But this would clearly be within the competence of a state legislature, even without direct authorization, at least in so far as to enforce attendance at such schools upon all children whose education was not otherwise provided for. Since the public schools are established by the public and for the benefit of the public, the system must be equal and impartial and provide the same accommodations and opportunities for all who may be entitled to take the benefit of them, without any distinction or discrimination, except such as may be founded on age or degree of advancement.

A part of the public school system, in this country, consists in the division of the state into separate "school districts," which are invested, to a considerable extent, with powers of local self-gov-

[76] But in New York it is said that the right to be educated in the common schools is not a constitutional right, but one derived entirely from legislation, and as such it is subject to such limitations as the legislature may from time to time see fit to make. Dallas v. Fosdick, 40 How. Prac. (N. Y.) 249.

[77] Stim. Am. St. Law, p. 11.

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ernment, and are regarded as quasi municipal corporations. Money for the support of the schools is raised by general taxation in the several districts, or throughout the state. To such taxation all property owners are liable, whether or not they have children to be educated at the public expense. The benefit of the public schools is for the state, and not for the individual, and no one can say that he is not benefited thereby, although one may be benefited more directly than another. Sometimes also the state will lend its aid to educational institutions which are not directly under its control, by exempting their property from taxation. In view of the importance to the state of a general diffusion of education, it cannot be said that such exemptions from taxation are an unlawful partiality shown to individuals.

DUE PROCESS OF LAW.

212. By the provisions of the federal constitution, both the United States and the several states are prohibited from depriving any person of his life, liberty, or property without due process of law.

The forty-sixth article of Magna Charta declares that "no freeman shall be taken, or imprisoned, or disseised, or outlawed, or banished, or anyways destroyed, nor will we [the king] pass upon him or commit him to prison, unless by the legal judgment of his peers, or by the law of the land." This has always been regarded as one of the great safeguards of liberty, and it has been incorporated, as a matter of course, in every American constitution. The language of the clause, as found in these instruments, is not always the same. It is more usual to employ the phrase "due process of law" than that which appears in Magna Charta. But it is well settled, by repeated decisions of the courts, that the two terms, "due process of law" and "the law of the land," are of exactly equivalent import.[78]

[78] 2 Co. Inst. 50; Millett v. People, 117 Ill. 294, 7 N. E. 631; Davidson v. New Orleans, 96 U. S. 97.

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Meaning of the Term; Method of Interpretation.

In view of the rule that words and phrases, used in constitutions, which had acquired a settled meaning at common law, are to be understood in their ancient and fixed signification, it is important to inquire what was the meaning of the phrase "law of the land" in the old English law. At the same time, while the historical interpretation of these words is of value, it is not to be relied on exclusively. Regard must be had to the principles of liberty which it was intended to perpetuate. It is true, as stated in Murray's Lessee v. Hoboken Land & Imp. Co.,[79] that any process, not otherwise forbidden, must be taken to be due process of law if it can show the sanction of settled usage both in England and this country. But this does not mean that everything known to the common law is due process of law. Neither does it mean that nothing can be held to answer this description unless it was a part of the common law or established by immemorial usage. "To hold that such a characteristic is essential to due process of law would be to deny every quality of the law but its age, and to render it incapable of progress and improvement." The constitutional guaranty does not deprive the state of the power to devise new remedies or processes, and to adapt them to the changing conditions of business and society. That which the provision is intended to perpetuate is not remedies or forms of procedure, but the established principles of private right and distributive justice, the very substance of individual rights to life, liberty, and property. "There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and varied experiences of our own situation and system will mould and shape it into new and not less useful forms."[80]

[79] 18 How. 272.

[80] Hurtado v. California, 110 U. S. 516, 4 Sup. Ct. 111, 292. See Brown v. Levee Com'rs, 50 Miss. 468; People v. Board of Supervisors, 70 N. Y. 228. In the case first cited it was held that a presentment or indictment by a grand jury, in cases of felony, is not essential to due process of law, where

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Definitions of Due Process of Law.

In the first place, it must be evident that "due process of law" means something more than a statute. An act of the legislature may be process of law, but it is not "due process" unless it conforms to the requirements of the constitution and to the settled principles of right and justice. "Everything which may pass under the forms of an enactment is not to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees, and forfeitures in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all the powers in the legislature. There would be no general permanent law for courts to administer or men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees, not to declare the law or administer the justice of the country." [81] The law of the land means the general law; a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial.[82] "Due process of law requires an orderly proceeding, adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing or an opportunity to be heard is absolutely essential." [83] "As to the words from Magna Charta incorporated in the constitution, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this, that they were intended to secure the individual from the arbitrary exercise of the

there is substituted for it a proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel and to the cross-examination of the witnesses produced on the part of the prosecution.

[81] Daniel Webster, in his argument in the Dartmouth College Case, 4 Wheat. 518. See, also, In re Ziebold, 23 Fed. 792; Hoke v. Henderson, 4 Dev. (N. C.) 15; Norman v. Heist, 5 Watts & S. (Pa.) 171.

[82] Clark v. Mitchell, 64 Mo. 564; Taylor v. Porter, 4 Hill (N. Y.) 140, 145.

[83] Stuart v. Palmer, 74 N. Y. 183.

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powers of government, unrestrained by the established principles of private rights and distributive justice." [84]

It should be observed that the constitutional requirement of due process of law extends to administrative and executive proceedings as well as to judicial action.[85] But when the property of the citizen is taken or injured by the public, either under the power of eminent domain or that of police or taxation, it cannot be said that he is deprived of it without due process of law. On the contrary, if the exercise of any of these powers is conducted in strict accordance with the rules of the constitution and the laws, the requirement of due process of law is fully complied with. But if there be any other lawful way in which the property of the individual can be taken from him by authority of the state, it must be according to the law of the land, or the exaction will be unwarranted.[86] We should also notice that a state cannot deprive an owner of his property without due process of law through the medium of a constitutional convention any more than it can through an act of legislation.[87] And whoever, by virtue of his public position under a state government, deprives another of life, liberty, or property without due process of law, violates the prohibition of the constitution; and as he acts in the name of the state and for the state, and is clothed with her power, his act is the act of the state. If this were not so, the prohibition would have no meaning, and it would follow that the state had clothed one of her agents with power to annul or evade it.[88]

Confiscation and Forfeiture Acts.

From the foregoing principles it will be easily apparent that forfeitures of property to the state, or confiscations of property by the state, are not conducted according to the requirement of "due process of law," unless the owner is afforded an opportunity to contest the charge against him and to save his property by showing its nonliability. This question arose in regard to the validity of certain acts of congress passed in 1861 and 1862, entitled acts "to suppress

[84] Bank of Columbia v. Okely, 4 Wheat. 235, 244. See, also, Leeper v. Texas, 139 U. S. 462, 11 Sup. Ct. 577.

[85] Stuart v. Palmer, 74 N. Y. 183.

[86] Sweet v. Hulbert, 51 Barb. (N. Y.) 312.

[87] Clark v. Mitchell, 69 Mo. 627.

[88] Ex parte Virginia, 100 U. S. 339.

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insurrection, to punish treason and rebellion, and to seize and confiscate the property of rebels." These statutes declared that all the estate and property, money, stocks, and credits of certain officers of the Confederate States, and of certain other persons therein mentioned, should be seized and confiscated by proceedings in rem in the federal courts, and that "it shall be a sufficient bar to any suit brought by such persons for the possession or the use of such property, or any of it, to allege and prove that he is one of the persons described in this section." The state courts held that proceedings under these acts were not simply in rem, but that the right to condemn property under them depended upon the delictum of the owner, and consequently that it was necessary to bring such owner into court in some manner so that he could have a hearing.[89] But the supreme federal court held these acts to be valid and constitutional, though the decision was based chiefly on the ground of their military expediency and as an exercise of the war powers of the government.[90] Forfeitures of property for violations of the United States internal revenue laws, when judicially ascertained and declared, are in conformity with the requirement of due process of law.[91] While property may be forfeited to the state for default in the payment of taxes duly assessed upon it, yet it is not competent, by such a proceeding, to vest in the state an absolute and indefeasible title, unless the owner shall first have been afforded an opportunity to appear and be heard before some tribunal or board, empowered to grant relief, and to make good any defenses which he may have against the legality of the tax or the liability of his estate therefor.[92]

Eminent Domain Proceedings.

The requirement of due process of law applies no less to proceedings under the power of eminent domain than to any others.[93]

[89] Chapman v. Bank, 85 N. Y. 437. And see Norris v. Doniphan, 4 Metc. (Ky.) 385.

[90] Miller v. U. S., 11 Wall. 268.

[91] Henderson's Distilled Spirits, 14 Wall. 44.

[92] Griffin v. Mixon, 38 Miss. 424; Kinney v. Beverley, 2 Hen. & M. 318; Black, Tax Titles, § 195.

[93] For a municipality to condemn land for a street through the property of a single owner, and then assess back upon his abutting property the entire dam-

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But here there are special rules in force, owing to the peculiar nature of the proceeding, which have been sufficiently explained in the chapter devoted to that subject. It should be added that the necessities of the case will sometimes justify a merely constructive notice to the owner of the property to be affected. Thus, in proceedings for the condemnation of land for a railroad, a published notice in compliance with the terms of the statute, specifying the section, township, range, county and state in which it is proposed to locate the road, is a sufficient notice to a non-resident owner of land therein, and such publication is due process of law as applied to such a case.[94]

Regulation of Property.

"The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use. Property may be destroyed, or its value may be annihilated; it is owned and kept for some useful purpose, and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived; and hence any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property."[95] But while the deterioration of property, or the imposition of new restrictions upon its use (as, for instance, by a law prohibiting the business for which the property was specially adapted) may amount to a deprivation of it, yet if this is done in the lawful exercise of the police power, such deprivation is not without "due process of law."[96] To compel an attorney to render services gratuitously to defend a person accused

ages awarded, together with the costs and expenses of the condemnation proceedings, is to take private property without due process of law. Scott v. City of Toledo, 36 Fed. 385; Baker v. Village of Norwood, 74 Fed. 997.

[94] Huling v. Improvement Co., 130 U. S. 559, 9 Sup. Ct. 603.

[95] In re Jacobs, 98 N. Y. 98. A dog is "property," within the meaning of the fourteenth amendment to the federal constitution. Jenkins v. Ballantyne, 8 Utah, 245, 30 Pac. 760.

[96] Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273; Munn v. People, 69 Ill. 80. And see Minneapolis & St. L. Ry. Co. v. Beckwith, 129 U. S. 26, 9 Sup. Ct. 207.

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of crime is not the taking of his time and labor, which are his property, without compensation or without due process of law, nor can he object thereto on the ground that he would be subjected to a burden or tax not borne by citizens generally.[97]

Abatement of Nuisances.

A statute or ordinance authorizing or requiring the destruction of private property, on the ground of its being a public nuisance, without any investigation or hearing, is void.[98] But a law giving to the courts of equity power to proceed by injunction for the abatement of a public nuisance, is not objectionable as depriving persons of their property without due process of law.[99]

DUE PROCESS OF LAW IN REVENUE AND TAX PROCEEDINGS.

213. Proceedings for the collection of the public revenue do not always require the intervention of a court or a jury, provided the property owner is afforded an adequate opportunity to contest the legality of the demand made upon his estate.

Summary processes, it should be observed, are not necessarily unjust or unconstitutional, or open to the objection that they deprive persons of their property without due process of law.[100] This principle is especially important in connection with the means provided for the collection of the public revenue. The power of the state to levy and collect taxes is inherent in the very notion of sovereignty. And the efficient exercise of this power (and hence the very maintenance of government) is entirely inconsistent with the idea that a jury, or the courts, must in all cases lend their aid in the proceedings. It is competent for the legislature, not only to determine what taxes shall be raised, but also to prescribe the means of their assessment and of their collection. And as a necessary consequence, it has the right to enact that payment of taxes shall

[97] Presby v. Klickitat Co., 5 Wash. 329, 31 Pac. 876.
[98] Darst v. People, 51 Ill. 286; Miller v. Burch, 32 Tex. 208.
[99] Carleton v. Rugg, 149 Mass. 550, 22 N. E. 55.
[100] McMillen v. Anderson, 95 U. S. 37.

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be enforced by the sale or forfeiture of the delinquent land. And all this may be done without providing for any judicial trial of the right to lay the taxes or of the liability of the person upon whom they are charged. But still, it is not competent for the legislature to proceed to the final and absolute divestiture of title without affording the tax payer an opportunity to be heard in opposition to it. "Due process of law" requires that he shall have a chance to interpose objections to the validity of the tax, or to the contention that his land is liable for it, or to the manner of assessing or collecting it, at some stage of the proceedings before his property is irrevocably gone, and before some authority competent to afford relief in case of invalidity or injustice. But this authority may be a board of assessors, or a board of equalization or of commissioners of forfeited lands.[101] Thus, a state tax law which gives notice of the proposed assessment to the property owner, by requiring him to hand in a list of his taxable property at a time named to a proper officer, and which gives him notice of the meeting of a board of equalization and review, and a right and opportunity to appear before such board and be heard on his objections to the assessment, and which affords him an opportunity, in a suit at law for the collection of the tax, to judicially contest the validity of the proceedings, does not necessarily deprive him of his property without due process of

[101] See Kelly v. Pittsburgh, 104 U. S. 78; Hagar v. Reclamation Dist., 111 U. S. 701, 4 Sup. Ct. 663; State v. Allen, 2 McCord, 55; Albany City Nat. Bank v. Maher, 20 Blatchf. 341, 9 Fed. 884; Griswold College v. Davenport, 65 Iowa, 633, 22 N. W. 904; Santa Clara Co. v. Southern Pac. R. Co., 18 Fed. 385; San Mateo Co. v. Southern Pac. R. Co., 13 Fed. 722; Gatch v. Des Moines, 63 Iowa, 718, 18 N. W. 310; In re McMahon, 102 N. Y. 176, 6 N. E. 400; Cincinnati, N. O. & T. P. R. Co. v. Com., 81 Ky. 492; Id., 115 U. S. 321, 6 Sup. Ct. 57; Bartlett v. Wilson, 59 Vt. 23. In the case last cited, it was said: "Government must have the public revenues, and obviously cannot postpone their collection to await the determination of a common law trial to see if it is entitled to them. It must from necessity proceed in a summary way, not omitting, however, those safeguards that protect individual rights. Its right to levy taxes is determined the moment the individual comes under the protection of its laws, and the only question open between it and its citizens is one of method in the enforcement of such right. If its method is one that in its intended and normal workings will result in equal and uniform taxation, as between all its citizens, and the right of hearing upon alleged errors is preserved, such method is due process of law."

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law, within the meaning of the fourteenth amendment.[102] Again, a statute by which the legislature validates a void assessment of taxes for local improvements is not open to this objection, although it gives the property owners no opportunity to be heard upon the whole amount of the assessment, if it does afford them notice and a hearing upon the question of the equitable apportionment among them of the total sum directed to be levied, and thus enables them to contest the constitutionality of the statute.[103] And a statute which authorizes a city to open and improve streets, and to assess the cost thereof on the owners of adjoining lots, does not deprive such owners of their property without due process of law nor deny to them the equal protection of the laws.[104]

DUE PROCESS OF LAW IN JUDICIAL ACTION.

214. Due process of law in judicial action implies a regular proceeding before a competent court, possessing jurisdiction, with an opportunity to the party to appear and be heard in his own defense or in rebuttal of the claim made against his property.

"When life and liberty are in question, there must in every instance be judicial proceedings, and that requirement implies an accusation, a hearing before an impartial tribunal with proper jurisdiction, and a conviction and judgment, before the punishment can be inflicted."[105] In judicial proceedings, due process of law requires that the party shall be properly brought into court, and when there, shall have the right to set up any lawful defense to any proceeding against him.[106] But, as was explained in regard to

[102] Kentucky Railroad Tax Cases, 115 U. S. 321, 6 Sup. Ct. 57.

[103] Spencer v. Merchant, 125 U. S. 345, 8 Sup. Ct. 921.

[104] Walston v. Nevin, 128 U. S. 578, 9 Sup. Ct. 192.

[105] 2 Story, Const. § 1946. Although due process of law, in criminal proceedings, requires a trial by jury, with the benefit to the prisoner of all the safeguards which the constitution has provided for his protection, yet a right of review in capital cases by an appellate court is not a necessary element of due process of law, but it is wholly within the discretion of each state to refuse it or grant it on any terms. Andrews v. Swartz, 156 U. S. 272, 15 Sup. Ct. 389.

[106] Wright v. Cradlebaugh, 3 Nev. 341.

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tax and revenue proceedings, this requirement does not invariably demand the intervention of a jury or the forms of a suit or action. It is enough if the owner has notice and a full and fair opportunity to appear before a tribunal or board of officers, empowered to grant relief, and there to contest the proceedings.[107] But when the proceedings are had in a court of justice, and are based upon full jurisdiction lawfully acquired, and are conducted with a due regard to all the rights of the defendant, it must in general be held that the judgment arrived at is due process of law.[108]

Jurisdiction.

The validity of judicial action, as tested by this requirement of the constitution, is primarily dependent upon jurisdiction. Jurisdiction is the power and authority constitutionally conferred upon (or constitutionally recognized as existing in) a court or judge to pronounce the sentence of the law, or to award the remedies provided by law, upon a state of facts, proved or admitted, referred to the tribunal for decision, and authorized by law to be the subject of investigation or action by that tribunal, and in favor of or against persons (or a res) who present themselves, or who are brought, before the court in some manner sanctioned by law as proper and sufficient. Jurisdiction naturally divides itself into three heads. In order to the validity of a judgment, the court must have jurisdiction of the persons, of the subject matter, and of the particular question which it assumes to decide. It cannot act upon persons who are not legally before it. It cannot adjudicate upon a subject which does not fall within its province as defined or limited by law. Neither can it go beyond the issues and pass upon a matter which the parties neither submitted nor intended to submit for its determination.[109] Jurisdiction of a particular controversy cannot be conferred on a court, which would not otherwise possess it, by the consent of the parties.[110] But the provisions of a statute, that where two or more persons are sued in the same action, on a joint contract, and process is served on either, judgment may be entered against all, and execution may be levied on the partnership property, do not operate to deprive them of their property

[107] Davidson v. New Orleans, 96 U. S. 97; Lent v. Tillson, 140 U. S. 316, 11 Sup. Ct. 825.

[108] Morley v. Railway Co., 146 U. S. 162, 13 Sup. Ct. 54.

[109] 1 Black, Judgm. § 215.

[110] 1 Black, Judgm. § 217.

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without due process of law.[111] And state legislation, simply forbidding the defendant to come into court and challenge the validity of service upon him in a personal action, without surrendering himself to the jurisdiction of the court, but which does not attempt to restrain him from fully protecting his person, his property, and his rights against any attempt to enforce a judgment rendered without due process of law, is not in violation of the fourteenth amendment.[112]

Proceedings in Personam and in Rem.

These two classes of proceedings are distinguished as follows: A proceeding in personam is one whereby it is sought to obtain an adjudication against an individual fixing upon him a personal responsibility, liability, or duty; a proceeding in rem is one which seeks to determine the liability of a particular estate or article of property to the satisfaction of a specific claim made against it, or to determine a question of status. In actions in personam, jurisdiction of the person must be obtained by the service of process upon him within the territorial jurisdiction; otherwise no personal judgment can be rendered against him which will answer the requirement of due process of law. In proceedings in rem, jurisdiction is obtained by the seizure or attachment of the property, or (in cases of status) by the jurisdiction of the person whose status is to be passed upon. Examples of proceedings in rem are libels in admiralty or prize cases, forfeitures under the revenue laws, actions begun by the attachment of property of non-residents, and inquisitions of lunacy and actions in divorce. In all these cases, the constitutional requirement is fully satisfied if there is such jurisdiction as may be obtained by the corporal subjection of the property in question to the control of the court, or, in divorce and lunacy cases, jurisdiction of the person whose status is in question. No personal notice need be served on the owner of the property or on the defendant in divorce, if he is beyond the territorial jurisdiction of the court; but it is sufficient if a reasonable constructive notice is given to him, as by the publication of an advertisement.[113] As regards proceedings against non-resi-

[111] Brooks v. McIntyre, 4 Mich. 316.

[112] Kauffman v. Wootters, 138 U. S. 285, 11 Sup. Ct. 298.

[113] Happy v. Mosher, 48 N. Y. 313; Gray v. Kimball, 42 Me. 299.

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dents, the distinctions between the two kinds of actions, and the requisites of jurisdiction in each, have been clearly stated by the United States supreme court in the important case of Pennoyer v. Neff.[114] Herein it was held that if the proceeding involves merely a determination of the personal liability of the defendant, he must be brought within the jurisdiction of the court by the service of process within the state, or by his voluntary appearance. And hence a personal judgment is without any validity if it is rendered by a state court in an action upon a money demand against a non-resident of the state who was served by a publication of the summons, but upon whom no personal service of process within the state was made, and who did not appear. But the state, having within its territory property of a non-resident, may hold and appropriate it to satisfy the claims of its own citizens against him, and its tribunals may inquire into his obligations to the extent necessary to control the disposition of that property. And substituted service by publication is sufficient to inform a non-resident of the object of proceedings taken, when property is once brought under the control of the court by seizure or some equivalent act.

Summary Proceedings.

Summary proceedings against sheriffs, constables, sureties on bail and appeal bonds, collectors of the public revenue, and the like, are not inconsistent with the constitutional guaranty of due process of law. Thus, the auditing of the accounts of a collector of the customs, and ascertainment of the balance due from him at the treasury department, the issue of a distress warrant therefor, and a levy on his property under the warrant, do not conflict with this provision of the constitution. "We apprehend that there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the crown, and especially those due from receivers of the revenue."[115]

Punishment of Contempts of Court.

A person who is imprisoned or fined for a contempt of court is not deprived of his liberty or property without due process of law,

[114] 95 U. S. 714.

[115] Murray's Lessee v. Hoboken Land & Imp. Co., 18 How. 272.

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if the proceedings were regular, although he was not tried by a jury, and although the authority which inflicts the punishment is the same to which the wrong was done.

Contempts of court are usually classified as direct and constructive. Direct contempts are those committed in the presence of the court, sitting judicially, or so near as to interfere with the orderly course of procedure. Such are insults offered to the judge in his presence, disturbing the peace and dignity of the court by violent or boisterous conduct, assaults, or drawing of weapons, or contumacious disregard of the authority of the court, as when a witness refuses to be sworn or to answer proper questions. Indirect or constructive contempts are such as are not committed in the presence of the court, but which tend by their operation to interrupt, obstruct, embarrass, or prevent the due and orderly administration of justice. Such contempts are committed by disobeying the lawful orders of the court, or refusing to do what is lawfully ordered, or violating an injunction, destroying papers essential to a pending case, practicing a deceit upon the court, interfering with the execution of process, or writing or speaking contemptuously or libelously of the judges with respect to matters judicially before them. Constructive contempts, again, are of two general classes: First, those wherein the contemptuous acts primarily affect public rights or the due administration of public justice; second, those which primarily affect private rights, and only remotely and incidentally affect public rights or public justice. When contempt proceedings are prosecuted to vindicate a public right, they are criminal offenses, in which the intent is a material and necessary ingredient. When they are prosecuted, either solely or primarily, to enforce and vindicate private rights, which have been secured from violation by a decree of the court, they are not criminal, but civil, and remedial in their nature, and are punishable without regard to the motive of the defendant.[116]

Direct contempts, committed in the presence of the court, are punishable summarily; that is, in such a case, the court may, upon its own knowledge of the facts, without further proof, without issue or trial, and without hearing any explanation of the motives of the

[116] Indianapolis Water Co. v. American Strawboard Co., 75 Fed. 972; Wyatt v. People, 17 Colo. 252, 28 Pac. 961.

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offender, immediately proceed to determine whether the facts justify punishment, and to inflict such punishment therefor as the law allows.[117] But when the contempt is constructive or indirect only, the proper course is to issue an attachment against the respondent to bring him into court, or a rule upon him to show cause why an attachment should not issue. The facts are then brought out by affidavits, or he may be examined on interrogatories. He has a right to be heard, and to present evidence in his defense. But he cannot claim a trial by jury; the court itself determines the question of contempt and punishment.[118] A rule upon a party to show cause why an attachment should not issue against him for a contempt must be served on him personally if possible; that is, if he can be found.[119] When the contempt is not committed in facie curiæ, the judge of course has no immediate knowledge of the facts. It must therefore be proved by affidavits of persons who witnessed it or have direct knowledge of it.[120] If the party purges himself on oath, the court will not hear collateral evidence for the purpose of impeaching his testimony and proceeding against him for the contempt.[121]

The courts of the United States have statutory power to punish for contempt, but "such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts."[122] Similar power is vested in all the courts of record of the several states. But the authority to punish for contempts is not usually accorded to justices of the peace and other

[117] Ex parte Terry, 128 U. S. 289, 9 Sup. Ct. 77; Watt v. Ligertwood, L. R. 2 H. L. Sc. 361; Middlebrook v. State, 43 Conn. 257; Wyatt v. People, 17 Colo. 252, 28 Pac. 961.

[118] State v. Matthews, 37 N. H. 450; State v. Doty, 32 N. J. Law, 403.

[119] Hollingsworth v. Duane, Wall. Sr. 141, Fed. Cas. No. 6,617.

[120] In re Judson, 3 Blatchf. 148, Fed. Cas. No. 7,563.

[121] U. S. v. Dodge, 2 Gall. 313, Fed. Cas. No. 14,975.

[122] Rev. St. U. S. § 725.

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inferior judicial officers or magistrates. In some states, however, it is also granted to these lower courts.[123]

Erroneous Judgments.

The mere fact that a judgment rendered against a person, when the court had jurisdiction, is irregular (without being void) or is erroneous in point of law, will not justify him in asserting that due process of law has been denied to him. When the legislature of a state enacts laws for the government of its courts while exercising their respective jurisdictions, which, if followed, will furnish parties the necessary constitutional protection of life, liberty, and property, it has performed its constitutional duty. And if one of its courts, acting within its jurisdiction, makes an erroneous decision in this respect, the state cannot be deemed guilty of violating the constitutional provision.[124]

PROTECTION OF VESTED RIGHTS.

215. Vested rights are to be secured and protected by the law, and a statute which divests or destroys such rights, unless it be by due process of law, is unconstitutional and void.

Definition of Vested Rights.

Vested rights are rights which have so completely and definitively accrued to or settled in a person that they are not subject to be defeated or canceled by the act of any other private person, and which it is right and equitable that the government should recognize and protect, as being lawful in themselves and settled according to the then current rules of law, and of which the individual could not be deprived arbitrarily without injustice, or of which he could not justly be deprived otherwise than by the established methods of procedure and for the public welfare.[125]

[123] See Murphy v. Wilson, 46 Ind. 537; Rutherford v. Holmes, 66 N. Y. 368; Albright v. Lapp, 26 Pa. St. 99; Whitcomb's Case, 120 Mass. 118.

[124] Arrowsmith v. Harmoning, 118 U. S. 194, 6 Sup. Ct. 1023; In re Converse, 137 U. S. 624, 11 Sup. Ct. 191; Caldwell v. Texas, 137 U. S. 692, 11 Sup. Ct. 224.

[125] Black, Law Dict. s. v. And see Pennie v. Reis, 132 U. S. 464, 10 Sup. Ct. 149.

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Vested rights are not generally provided for in the constitutions specifically and by name. But they are protected against unjust laws divesting them by those constitutional clauses which require due process of law when one is to be deprived of his property, those which regulate the exercise of the power of eminent domain, and others of similar character.[126] And it should be observed that with and by means of due process of law vested rights may lawfully be divested. This happens when the individual is compelled to pay taxes lawfully levied and assessed, when his property is taken by the public authorities for a public purpose, under the power of eminent domain, when the free use and enjoyment of his property is interfered with by law in the enforcement of lawful police regulations, and also when his lands or goods are seized and sold for the satisfaction of an execution duly issued upon a judgment recovered against him in a suit at law. But there can be no such thing as a vested right in a public law, which is not in the nature of a grant, and the legislature may repeal all laws which are not in the nature of contracts or private grants. But the repeal of a law will not be permitted in any case to affect or impair rights which have been acquired under it.[127]

[126] In a leading case in New Jersey it is said: "In the entire category of rights which are complete and vested in the person there are but two classes for which immunity against the encroachment of the law-maker can be claimed. The first class are those expressly protected by constitutional provisions, either federal or state, such as the right of trial by jury, the privilege of the writ of habeas corpus, the right to be secure against unreasonable searches, and protection against cruel and unusual punishments. The other class is not expressly shielded by the fundamental law, and is limited to two or three instances. These are the title to private property, the incompetency of the legislature to pass a law denying to a man notice, actual or constructive, of a suit against him or a right to be heard therein, and the principle that a man shall not be made a judge in his own cause. These rights rest upon clear implications from constitutional clauses, strengthened by the fact that they are of such fundamental character that they are deemed essential to the existence of society, and therefore underlie the organic law itself. When we go outside of those vested rights expressly reserved and guarded in the constitution, it will be found that the exceptional cases mentioned can be rested upon some stable foundation; that there is clear recognition of them in the organic law itself." Moore v. State, 43 N. J. Law, 203, 243.

[127] Dobbins v. Bank, 112 Ill. 553.

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Nature of Estates.

The nature of estates is to a considerable degree subject to the control of the legislature, and may be changed as the public policy or interests may require, provided only that vested interests in property be not made less beneficial by such changes. Thus, there is no constitutional objection to a statute making joint heirs tenants in common, even as to estates already vested at the time of its enactment. Neither tenant has any vested interest in the moiety of the other. All that the statute takes away from either is the chance of acquiring the whole estate by survivorship; but this is nothing more than a hope or expectation, like the expectation of a child to inherit the estate of a parent.[128]

Rules of Descent.

It is an ancient maxim of the law that no man is heir to the living. So long, therefore, as a man retains the power to dispose of his property as he chooses, the expectation which any other person may have of succeeding to his estate, should he die intestate, is not a vested right, but a mere anticipation. Hence it is in the power of the legislature to change the rules of descent, in respect to all estates which have not already passed to heirs or devisees.[129] Conversely, the right of the citizen to dispose of his property by will is not a constitutional right which the legislature cannot destroy or abridge. The right to acquire property implies the right to dispose of it; but these are rights belonging to the living. As a disposition by will does not take effect until the death of the testator, it cannot be said that a law restricting or limiting the proportion of his property which he may bequeath away from his natural heirs, or avoiding bequests to superstitious uses, or the like, impairs any of his vested rights of property.[130]

Dower and Curtesy.

A wife's right of dower does not become vested by the marriage, but remains an interest in expectancy until the death of the hus-

[128] Stevenson v. Cofferin, 20 N. H. 150; Miller v. Dennett, 6 N. H. 109; Annable v. Patch, 8 Pick. (Mass.) 360.

[129] Henson v. Moore, 104 Ill. 403; Wyatt v. Smith, 25 W. Va. 813; Hughes v. Murdock, 45 La. Ann. 935, 13 South. 182.

[130] Patton v. Patton, 39 Ohio St. 590.

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band. Until that time, therefore, it is not protected by the constitution, but may be abolished by statute. And the same is true of a husband's inchoate right of curtesy, after the marriage but before the birth of issue. These expectant rights are not property or vested interests in such sense as to secure them against legislative interference.[181]

Betterment Laws.

These are statutes which allow to a person who has held land adversely in good faith the value of the improvements which he has put upon it, and grant him a lien therefor, when his supposed title is overthrown by the real owner. They are not unconstitutional as divesting rights or lacking the essentials of due process of law, since they merely enforce an equitable right.[182]

Causes of Action.

A cause of action, accruing at common law or by a contract, which is fixed and settled in a particular person, and continues in force, is a vested right within the protection of the constitutions. It is property, and it cannot lawfully be divested by legislative interference, or by taking away the legal means of making it effective, or by so hampering it with conditions or restrictions as to render it practically worthless.[183] "There is no doubt," says the supreme court of Michigan, "that a right in action, where it comes into existence under common-law principles, and is not given by statute as a mere penalty or without equitable basis, is as much property as any tangible possession, and as much within the rules of constitutional protection." [184] But, on the other hand, the legislature may take away defenses based on mere informalities; a party has no vested right in such a defense, where it does not affect his substantial equities.[185]

[181] Thurber v. Townsend, 22 N. Y. 517; In re Curtis' Will, 61 Hun, 372, 16 N. Y. Supp. 180; McNeer v. McNeer, 142 Ill. 388, 32 N. E. 681; Denny v. McCabe, 85 Ohio St. 576; Chapman v. Chapman, 48 Kan. 636, 29 Pac. 1071; Brown v. Clark, 44 Mich. 309, 6 N. W. 679.

[182] Ross v. Irving, 14 Ill. 171.

[183] Cornell v. Hichens, 11 Wis. 353.

[184] Dunlap v. Railway Co., 50 Mich. 470, 15 N. W. 555.

[185] Tifft v. City of Buffalo, 82 N. Y. 204.

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Remedies.

No one can be said to have a vested right in any particular remedy for the enforcement of his rights or the redress of injuries done him. Remedies and remedial rights and process are always subject to the control of the legislature. It would not be competent to deny all remedy. But subject to this limitation, the state may substitute one remedy for another, or change modes of procedure, or alter the system of courts, as public policy may seem to require. A man with a fixed right of action may be said to have a vested right to a remedy, but not to that particular form of remedy which was available when his cause of action accrued.[186] But the right to a particular remedy may become fixed by the agreement of the parties, or by the attaching of a lien under it, in such a way as to be beyond the control of the legislature. For example, a right to foreclose, pursuant to the statute in force at the time of the execution of a mortgage, under the power of sale contained in it, cannot be taken away by subsequent legislation.[187] Such may also be the case with regard to a statutory lien. But, according to the generally accepted doctrine, it must have attached to the property before the repeal of the statute which created it. Thus, it is said that a mechanic's lien does not arise out of his contract, but depends upon the statute alone; and where a statute gives a right in its nature not vested, but remaining executory, if it does not become executed before a repeal of the law, it falls with it. Hence, if such a lien does not fully fasten itself upon the property before the repeal of the law, it is lost.[188] A law providing that the lien on land of a tax or assessment for a public improvement shall take precedence of the lien of a mortgage thereon, executed before its passage, is not unconstitutional as depriving the mortgagee of a vested right.[189] Of course it should be remembered that the right of trial by jury cannot be taken away in cases where it is guarantied by the consti-

[186] Richardson v. Akin, 87 Ill. 138; Leavenworth Coal Co. v. Barber, 47 Kan. 29, 27 Pac. 114; People v. Richmond, 16 Colo. 274, 26 Pac. 929; Rollins v. Love, 97 N. C. 210, 2 S. E. 166.

[187] O'Brien v. Krentz, 36 Minn. 136, 30 N. W. 458.

[188] Bailey v. Mason, 4 Minn. 546 (Gil. 430). Compare Garneau v. Mill Co., 8 Wash. 467, 36 Pac. 463.

[189] Murphy v. Beard, 138 Ind. 560, 38 N. E. 33.

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tution. Nor, if the obligation of a contract is involved, can it lawfully be impaired by any changes in the remedy. And the converse of this rule is equally true. That is, if there is a right or cause of action in existence, for which the law has provided no remedy or an inadequate remedy, the party against whom the right or cause of action avails has no vested right to have the law continue as it is, and he cannot complain if a subsequent statute provides a new, additional, or more effective remedy.[140]

Statutes of Limitation.

Vested rights may be lost by the negligence or indifference of the owner. All the states have enacted statutes of limitation, by which it is provided that actions for the enforcement of rights or the redress of injuries must be instituted within a certain time or else be forever barred. It is reasonable to presume that after a certain lapse of time the plaintiff has abandoned his claim or has received satisfaction for it. And it would be unjust to allow him to delay until the defendant shall have lost the means of disproving the claim. Moreover, it is for the interest of the state that there should be an end of litigation. Hence while the state must provide a remedy for all rights of action, it is under no obligation to allow the suitor an indefinite right of access to the courts. Any statute of limitations must afford an opportunity to bring an action within a reasonable time. Rights cannot be cut off arbitrarily.[141] But if this condition is satisfied, the negligent or slothful suitor, when confronted with the bar of the statute of limitations, cannot complain that he is unjustly deprived of his vested rights. When the period prescribed by the statute of limitations has once run, so as to cut off the remedy which one might have had for the recovery of property in the possession of another, the title to the property, irrespective of the original right, is regarded in the law as vested in the possessor, who is entitled to the same protection in respect to it which the owner is entitled to in other cases. A subsequent repeal of the limitation law could not be given a retro-

[140] Campbell v. Holt, 115 U. S. 620, 6 Sup. Ct. 209; Hope v. Johnson, 2 Yerg. (Tenn.) 123; Town of Danville v. Pace, 25 Grat. (Va.) 1.

[141] Chapman v. Douglas Co., 107 U. S. 348, 2 Sup. Ct. 62; Moody v. Hoskins, 64 Miss. 468, 1 South. 622.

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active effect so as to disturb this title.[143] But it is held that the repeal of a statute of limitations of actions on personal debts does not, as applied to a debtor the right of action against whom is already barred, deprive him of his property without due process of law.[144] It is a well-settled rule that the provisions of a statute of limitation do not run against the state, as they do against a private suitor, unless the state is expressly named in the statute and its rights waived.[145] And for obvious reasons, statutes of limitation of the several states do not apply to actions wherein the government of the United States is the plaintiff.[146]

Rules of Evidence.

In criminal prosecutions, as we shall presently see, the accused has a right to be tried by the rules of evidence in force at the time of the commission of the alleged offense, or, at least, to be exempt from the retroactive operation of any statute which would change the rules of evidence to his disadvantage, as by making less or different evidence sufficient to convict him. But, in civil issues, the rules of evidence are not grants of a right from the state to the private suitor, nor are they property in which any person can have a vested right. They are a part of the substantive law of the state, and the legislature has the power to make such rules, or to modify or repeal those already existing, and make them applicable to pending controversies, subject only to such specific restrictions as may be found in the constitution.[146] But still it is possible to frame rules of evidence which would indirectly cut off vested rights, by making it impossible for the owner to secure their recognition or enforcement by the courts; and this, of course, would be constitutionally inadmissible. Such would be the case with a statute making tax deeds conclusive evidence of good title in the tax purchaser.[147]

[142] Power v. Telford, 60 Miss. 195.

[143] Campbell v. Holt, 115 U. S. 620, 6 Sup. Ct. 209.

[144] Glover v. Wilson, 6 Pa. St. 290; Alexander v. State, 56 Ga. 478; City of Jefferson v. Whipple, 71 Mo. 519; Josselyn v. Stone, 28 Miss. 753.

[145] U. S. v. Belknap, 73 Fed. 19.

[146] State v. Weston, 3 Ohio Dec. 15.

[147] Kelly v. Herrall, 20 Fed. 364; Ensign v. Barse, 107 N. Y. 329, 14 N. E. 400, and 15 N. E. 401; McCready v. Sexton, 29 Iowa, 356; Black, Tax Titles, §§ 451, 452.

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SEARCHES AND SEIZURES.

216. The fourth amendment to the federal constitution provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." And in all the states a similar guaranty has been made a part of the organic law.

217. These constitutional provisions protect the citizen against—

(a) All unauthorized intrusion into his dwelling house by officers or others claiming to act under the authority of the law.

(b) The compulsory production of his books and papers to be used as evidence against him.

(c) The unlicensed examination of the contents of letters or sealed packages intrusted by him to the government for transmission through the mails.

d) The search of his house for specific property alleged to be therein, in aid of the enforcement of the criminal laws or police regulations, except it be under the authority of a search warrant lawfully issued, and complying with all constitutional and statutory requirements.

Security of the Dwelling.

It was the boast of the English common law that "every man's house is his castle." In the familiar words of Chatham, "the poorest man may, in his cottage, bid defiance to all the forces of the crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the king of England may not enter; all his force dares not cross the threshold of the ruined tenement." Nor was this conception of the sanctity of the private dwelling known only to the ancient law of our parent coun-

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try. In the imperial law of Rome it was expressed in the noble maxim, "Domus sua cuique est tutissimum refugium," and in the correlative rule, "Nemo de domo sua extrahi potest." Such, therefore, is the jealous care with which the law protects the privacy of the home, that the owner may close his doors against all unlicensed entry and defend the possession and occupancy of his house against the intruder by the employment of whatever force may be needed to secure his privacy, even, in extreme cases, to the taking of life itself. A man assaulted in his own dwelling is not obliged to "flee to the wall," but he may defend his home, which is his castle of refuge, to any and all extremities.[148] It will therefore be seen that the right of security in the dwelling, justly esteemed one of the most important of civil rights, was not created by and did not depend upon the constitution, but existed long before, and was merely guarantied and secured by that instrument.[149] And although the constitutional provisions relate only to the privilege of the domicile against unreasonable searches and seizures, yet, if there be any other way in which the lawful rights of the dwelling may be invaded, it is adequately forbidden and punished by the common law. It should be added that the fourth amendment to the constitution of the United States does not extend to the state governments, but is a restriction only upon the legislature and judiciary of the Union.[150]

When an Entry may be Forced.

The privacy of the dwelling is not to stand in the way of the due execution of the laws, nor is a man's house a sanctuary for those who are amenable to the criminal justice of the state. An entry into a private house may be forced by the officers of the law for the purpose of capturing a felon, or in order to arrest a person, known to be in hiding there, for treason, felony, or breach of the peace. Again, the house may be entered, and the owner evicted, when he is no longer entitled to hold the possession of the property, that right having passed to another by law; when it becomes necessary to destroy the building in order to prevent the spread of a conflagration;[151] and

[148] Estep v. Com., 86 Ky. 39, 4 S. W. 820; State v. Peacock, 40 Ohio St. 333; People v. Dann, 53 Mich. 490, 19 N. W. 159.

[149] U. S. v. Crosby, 1 Hughes, 448, Fed. Cas. No. 14,893.

[150] Reed v. Rice, 2 J. J. Marsh. (Ky.) 45.

[151] A house in a town may be pulled down and removed, to arrest the spread

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when it is necessary to examine into the sanitary conditions of the house, or to remove or quarantine a person lying sick therein of a dangerous contagious disease.[152] But with these exceptions, the only manner in which officers can force their way into a dwelling house against the will of the proprietor, is by the sanction and command of a search warrant, the requisites of which we shall presently consider. With regard to the service of mere civil process, the rule is that the officer may not break or force open the outer door; but if he has lawfully gained an entry into the tenement, without force, he may then break open an inner door if he must do so in order to execute his writ.[153]

Compulsory Production of Papers.

It will be observed that the constitutional provisions against unreasonable searches and seizures apply not merely to a man's house, but also to his person and his papers. The force and effect of this part of the provision was fully considered in a case before the supreme court of the United States, in regard to a clause of the customs revenue law which authorized a federal court, in revenue cases, on motion of the government's attorney, to require the defendant to produce in court his private books, invoices, and papers, and directed that, if he refused to do so, the allegations of the government might be taken as confessed. It was held that it does not require an actual entry upon premises and a physical search for and seizure of papers to constitute an unreasonable search and seizure within the meaning of the fourth amendment. A compulsory production of a party's private books and papers, to be used against himself or his property in a criminal or penal proceeding or for a forfeiture, is within the spirit and meaning of that amendment. And it is equivalent to such

of a fire, where it is inevitable that the house will take fire and be consumed if it is permitted to stand, and it is inevitable that, if it takes fire and is consumed, it will spread the fire to other houses. Beach v. Trudgain, 2 Grat. (Va.) 219; Surocco v. Geary, 3 Cal. 69; Stone v. Mayor, etc., 25 Wend. (N. Y.) 157.

[152] When a person sick with a dangerous contagious disease is quarantined in his own house, the health officers may enforce stringent regulations for the prevention of the spread of the disease, but, unless fully authorized by statute, they cannot take entire possession of the house and virtually turn it into a hospital. Spring v. Inhabitants of Hyde Park, 137 Mass. 554; Brown v. Murdock, 140 Mass. 314, 3 N. E. 208.

[153] Semayne's Case, 5 Coke, 91. And see Weimer v. Bunbury, 30 Mich. 201.

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compulsory production to make the non-production of the papers a confession of the allegations which it is pretended they would prove.[154]

Inviolability of the Mails.

The same principle which protects a man's private papers in his own house from unreasonable search and seizure should also secure their inviolability when he confides them to the custody of the government for the purpose of transmission through the mails. "Letters and sealed packages in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the constitution." [155]

General Warrants.

The proximate cause for the introduction of this provision into the federal bill of rights was the apprehension that there might be an abuse of official power similar to that which had disgraced the reign of more than one English sovereign, under the system of inquisitorial proceedings called the issue of "general warrants." These warrants were used principally in the case of political offenses, and directed the arrest of the authors, printers, and publishers of obscene and seditious libels, and the seizure of their papers. They were issued by the secretaries of state, and authorized the officers to search all suspected places and seize all suspected persons. But their illegality consisted in the fact that no individual was specially

[154] Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524.

[155] Ex parte Jackson, 96 U. S. 727, 733. And see U. S. v. Eddy, 1 Biss. 227, Fed. Cas. No. 15,024.

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named or described, or that no specific description of the place to be searched was given. The execution of the warrant was therefore left very much to the caprice of the officer. These warrants were plainly contrary to the spirit of the common law, and in violation of private rights. And they were liable to be wielded as instruments of tyranny in the hands of corrupt officials. Yet they continued in use until 1763, at which time the court of king's bench declared that they were illegal, and allowed the recovery of damages by those whose rights had been invaded under such warrants.[156]

Search Warrants.

The constitutions do not forbid the issue of search warrants. They only prohibit "unreasonable" searches. Generally speaking, the constitutional requirements as to the issue of such warrants are only three in number: First, no warrant shall issue but upon probable cause, and this "probable cause" must be made out by a sufficient showing to the court or magistrate applied to for the warrant that such a case exists as is contemplated by the law as proper for the use of this writ; second, the application must be supported by an oath or affirmation; third, the warrant must particularly describe the place to be searched and the persons or things to be seized. But there are certain other requisites derivable from clear implications from the constitution or from the general principles of law. Thus, the constitutions, while regulating the issuance of such warrants, do not grant the power to issue them. Consequently, no court or judge has inherent power to grant such a writ, but it must be authorized by statute. Again, the general rules of law require that such process should be executed by an officer of the law. And, further, since this process is not final process, but is only used as a means to some further end, it will not authorize the officer executing the writ to make any final disposition of the property which may be seized under it. Any articles so taken must be brought before the court or magistrate, to be proceeded against and disposed of according to law. Even stolen goods cannot be restored to their owner immediately upon their recovery by a search warrant; and, if the property taken is claimed to have been kept or concealed in

[156] Wilkes v. Wood, 19 How. St. Tr. 1153, Broom, Const. Law, 544; Leach v. Money, 19 How. St. Tr. 1001, Broom, Const. Law, 522; Entick v. Carrington, 19 How. St. Tr. 1030; Broom, Const. Law, 555; 2 Story, Const. § 1902; Pom. Const. Law, § 241.

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violation of law, it cannot be forfeited or destroyed until the facts shall have been duly ascertained according to law, and the owner accorded an opportunity to defend.[157]

As a general rule, search warrants are to be employed only as an aid in the enforcement of the criminal laws. They may be issued for the recovery of goods alleged to have been stolen,[158] for the discovery of merchandise smuggled into the country and concealed to avoid the payment of duties,[159] for intoxicating liquors kept or intended for sale in violation of law,[160] for instruments and apparatus used in gambling,[161] for the seizure of lottery tickets or materials for drawing a lottery,[162] and for forged warrants, writs, certificates, or other such legal documents.[163] But a statute authorizing the issue of warrants, by judges of insolvency, on the complaint of an assignee, to search for property of the debtor, is unconstitutional and void.[164] Nor is this warrant ever allowed to be used solely as the means of obtaining evidence against a person accused of crime. It is true that in some few cases, as in the search for stolen goods, the discovery of the article in question may furnish an item of evidence against the possessor of it. But in all such cases, either the complainant or the public has some interest in the property or in its destruction, and the finding of evidence is not the immediate reason for issuing the warrant. But it was settled by the common law, in the cases of the "general warrants," and has always been the understanding of the American people, that this process could not be employed as a means of gaining access to a man's house or his letters and papers for the mere and sole purpose of securing evidence to be used against him in a criminal or penal proceeding. Such methods would also be inconsistent with the great principle of constitutional law in criminal cases that no man shall be compelled to

[157] As to the requisites of search warrants, see Bish. Cr. Proc. §§ 240–246; Stim. Am. St. Law, § 71.

[158] Stone v. Dana, 5 Metc. (Mass.) 98.

[159] Rev. St. U. S. § 3066.

[160] Fisher v. McGirr, 1 Gray (Mass.) 1.

[161] Hastings v. Haug, 85 Mich. 87, 48 N. W. 294; Com. v. Gaming Implements, 119 Mass. 332.

[162] Com. v. Dana, 2 Metc. (Mass.) 329; People v. Noelke, 29 Hun, 461.

[163] Langdon v. People, 133 Ill. 382, 24 N. E. 874.

[164] Robinson v. Richardson, 13 Gray (Mass.) 454.

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furnish evidence against himself. Both of these provisions relate to the personal security of the citizen. And when the compelling a man to be a witness against himself is the very object of a search and seizure of his private papers, it is an "unreasonable" search and seizure within the meaning of the constitutional prohibition.[165]

Search Warrants in Aid of Police Regulations.

It is within the power of a state legislature, in the exercise of its powers of police, to declare the possession of certain articles of property (such as intoxicating liquors, explosives, obscene publications, or gambling devices) either absolutely or in particular places and under particular circumstances, to be unlawful, because they would be injurious, dangerous, or noxious, and it may authorize the issue of search warrants and the seizure and confiscation or destruction of such articles, so it be by due process of law.[166] But a law authorizing the search for and seizure of liquor, which does not require any notice of the nature and cause of the accusation to be given to the accused, nor provide any means by which he is to be informed when, or before whom, or where the search warrant is returnable, or for a trial of the question of the violation of the law, is in conflict with the constitutional guaranty and therefore void.[167] And of course the same principle, in regard to the requirement of notice and a judicial investigation, applies equally to all other cases in which search warrants may be authorized in pursuance of the power of police. Thus, a statute making it illegal to maintain nets within half a mile of the mouth of certain rivers, and providing for the confiscation of such nets, in so far as it relates to such confiscation, is unconstitutional, if it deprives the owner of his property without notice or service of process.[168]

[165] Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524.

[166] Fisher v. McGirr, 1 Gray (Mass.) 1; State v. Brennan, 25 Conn. 278; Allen v. Staples, 6 Gray (Mass.) 491; Gray v. Kimball, 42 Me. 299; Santo v. State, 2 Iowa, 165; State v. O'Neil, 58 Vt. 140; Jones v. Root, 6 Gray (Mass.) 435.

[167] Hibbard v. People, 4 Mich. 125; Fisher v. McGirr, 1 Gray (Mass.) 1; Greene v. James, 2 Curt. 187, Fed. Cas. No. 5,766; State v. Snow, 3 R. I. 64.

[168] State v. Owen, 3 Ohio N. P. 181.

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Search Warrants in Aid of Sanitary Regulations.

There are some cases in which the privacy of the dwelling must be subordinated to the enforcement of necessary police regulations for the preservation of the public health, particularly in populous cities. Thus, it may be necessary to search private houses for the purpose of inspecting their sanitary condition, or to ascertain the existence of a nuisance detrimental to health, or to discover persons who are affected with a dangerous disease such as threatens an epidemic. Such inspections are usually conducted under the orders of the health officers, and are so seldom resisted that the question of their legality does not appear to have come before the courts. But if an entry into a private house could not be obtained, for such purposes, without the employment of force, it is probable that the case would justify the issue of a search warrant.[169]

Time of Execution of Warrant.

At common law, a search warrant was always directed to be executed by day, and it was doubtful whether it could be lawfully executed in the night time, even if no time was limited in the direction.[170] But search warrants issued in aid of the enforcement of the police or sanitary regulations of the state are not common law warrants, but rest entirely on statute. Consequently, it is not necessary to their validity that they should limit the service to the day time.[171]

Military Orders.

The constitutional provision against unreasonable searches and seizures cannot be understood to prohibit a search or seizure made in attempting to execute a military order authorized by the constitution and a law of congress, where the jury have found that the seizure was proper and reasonable.[172]

[169] Tied. Lim. 464.

[170] 2 Hale, P. C. 150.

[171] Com. v. Hinds, 145 Mass. 182, 13 N. E. 397; State v. Brennan's Liquors, 25 Conn. 278.

[172] Allen v. Colby, 47 N. H. 544.

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QUARTERING OF SOLDIERS.

218. The third amendment to the federal constitution provides that "no soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law." And similar provisions are found in the constitutions of many of the states.

This provision was probably suggested by a clause of the Petition of Rights presented to Charles I., wherein it was stated that "great companies of soldiers and mariners have been dispersed into diverse counties of the realm, and the inhabitants against their wills have been compelled to receive them into their houses and there to suffer them to sojourn, against the laws and customs of this realm, and to the great grievance and vexation of the people." Also, one of the grievances set forth in the Declaration of Independence was the "quartering of large bodies of armed troops among us." There has never been any necessity for the courts to extend to individuals the protection guarantied by this provision, and the clause is of historical interest only. It is an additional guaranty of the security and privacy of a man's dwelling house. "Its plain object," says Story, "is to secure the perfect enjoyment of that great right of the common law, that a man's house shall be his own castle, privileged against all civil and military intrusion." [178]

RIGHT TO OBTAIN JUSTICE FREELY.

219. In many of the states, the constitutions provide that every person ought to obtain justice freely, without being obliged to purchase it, completely and without denial, promptly and without delay.

This provision is founded on the forty-seventh article of Magna Charta, wherein the king declares: "We will sell to no man, we will deny to no man, nor defer, right or justice." The guaranty of free,

[178] 2 Story, Const. § 1900.

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prompt, and effectual justice, although it is but seldom violated by the legislature or the courts, is one of the most important and valuable principles of freedom. Of course this constitutional provision does not mean that the laws shall be perfect, or their administration unerring. It means that the courts shall always be open to every suitor, be he high or low, rich or poor; that justice shall not be bought or sold, nor made a luxury available only to the wealthy; that for every infraction of the rights of the individual the law should provide a practical and adequate remedy; and that justice should not be deferred by vexatious and unnecessary delays, nor withheld during a longer time than is required for the regular and orderly course of judicial proceedings. But this provision does not have the effect to prohibit the taxation of fees and costs in legal proceedings.[174] Neither does it debar the legislature from authorizing the courts to require suitors to furnish security for the costs, in proper cases.[175] To the same category belong statutes requiring a person who seeks to have a tax sale of land set aside to deposit in court the amount of the purchase money, together with all taxes and costs accruing since the sale. Such laws are not in conflict with this provision of the constitution, at least when the ground of attack consists in irregularities or omissions in the tax proceedings, though it is probably otherwise when objection is taken to the legality of the tax itself.[176]

[174] Perce v. Hallett, 13 R. I. 363; Walker v. Whitehead, 43 Ga. 538.

[175] Conley v. Woonsocket Inst., 11 R. I. 147. But in Pennsylvania it is held that a rule of court requiring security for costs to be given by the plaintiff in actions of tort is unconstitutional, since its enforcement would be a denial of justice to any one too poor to comply with it. Schade v. Luppert, 17 Pa. Co. Ct. R. 460. A law providing for the use of "struck juries" when claimed by either party, and requiring the applicant therefor to pay the fees for striking the same and also the fees of the jury, is not in conflict with this constitutional provision. Lommen v. Gaslight Co. (Minn.) 68 N. W. 53.

[176] Black, Tax Titles, § 438; Craig v. Flanagin, 21 Ark. 319; Pope v. Macon, 23 Ark. 644; Coonradt v. Myers, 31 Kan. 30, 2 Pac. 858.

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TRIAL BY JURY.

220. Provisions in the constitutions of the several states, as well as in the constitution of the United States, secure to suitors a right of trial by jury in civil issues.

221. An essential element of this right is the independence of the jury, and the constitutional provisions imply that the jury shall not be controlled or coerced by the court.

222. Trial by jury can be claimed as a matter of right only in cases suitable for that mode of trial, and where the right existed at the time of the adoption of the particular constitution. It cannot be claimed as of right in—

(a) Equity cases.

(b) Admiralty cases.

(c) Summary proceedings.

223. It is not competent for the legislature to impose upon the right of trial by jury such onerous or oppressive restrictions or conditions as would make it practically unavailing to a party for his benefit or protection.

The Seventh Amendment.

The seventh amendment to the federal constitution provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." This amendment, although it provides in general terms that the right of trial by jury shall be preserved, was intended to apply, and does apply, only to proceedings in the courts of the United States, and it does not affect proceedings in the state courts, nor the power of the states to regulate the form and method of trials in their own tribunals.[177] Neither this clause nor the provisions of the fourteenth amendment forbids the states to abolish or deny the right of

[177] Edwards v. Elliott, 21 Wall. 532; Livingston v. Mayor of New York, 8 Wend. (N. Y.) 85.

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trial by jury. Such prohibition, if any, must be found in the constitution of the particular state.[178] The language of the seventh amendment is to be taken broadly and liberally, as preserving an important right. Thus it is said that it may, in a just sense, be construed to embrace all suits which are not of equity or admiralty jurisdiction, whatever peculiar form they may assume to settle legal rights.[179] But the provisions of the seventh amendment did not apply to a preliminary examination under the fugitive slave law, such a proceeding not being according to the course of the common law, but constitutional and statutory.[180]

Provisions in the State Constitutions.

The provisions in the various state constitutions relative to trial by jury generally declare that this right "shall remain inviolate," or "shall be preserved," or "shall be as heretofore." But in some, the right is expressly limited to civil cases or civil issues, or even to civil cases wherein an issue of fact proper for a jury is joined in a court of law. In several states, also, cases of minor cognizance or where only a small amount is involved are, for reasons of obvious propriety, excepted from the right of trial by jury. And in several, this right is denied "in cases heretofore used and practiced," which means that cases which were tried without a jury according to the established practice at the time of the adoption of the constitution are not to be included in the general guaranty of that right.[181]

Meaning of Trial by Jury.

"The terms 'jury' and 'trial by jury' are, and for ages have been, well known in the language of the law. They were used at the adoption of the constitution, and always, it is believed, before that time, and almost always since, in a single sense. A jury for the trial of a cause was a body of twelve men, described as upright, well-qualified, and lawful men, disinterested and impartial, not of kin nor personal dependents of either of the parties, having their homes within the jurisdictional limits of the court, drawn and selected by officers free from all bias in favor of or against either party, duly impannelled un-

[178] Walker v. Sauvinet, 92 U. S. 90.
[179] Parsons v. Bedford, 3 Pet. 433, 447.
[180] Miller v. McQuerry, 5 McLean, 469, Fed. Cas. No. 9,583.
[181] Stim. Am. St. Law, §§ 72, 73.

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der the direction of a competent court, sworn to render a true verdict according to the law and the evidence given them, who, after hearing the parties and their evidence, and receiving the instructions of the court relative to the law involved in the trial, and deliberating, when necessary, apart from all extraneous influences, must return their unanimous verdict upon the issue submitted to them." [182]

Number and Composition of the Jury.

Wherever the right of trial by jury is preserved and guarantied by the constitutions, a common law jury is meant; and at common law a jury was always composed of twelve men, no more and no less. Therefore it is not lawful for the legislature (unless specially empowered by the constitution) to provide that a jury for the trial of civil issues in cases which required a jury at common law may be composed of a less or greater number than twelve.[183] But wherever facts are to be found in any proceeding in which a jury was not required by the common law, a jury of any number may be authorized in the discretion of the legislature; and as juries did not belong to courts held by justices of the peace, the legislature, if it authorizes juries in such courts at all, may provide that they shall consist of a different number of men.[184] It was also a part of the trial by jury at common law that the jurors should render a unanimous verdict. Consequently, to provide by law that a majority of a petit jury, or less than the whole number, may render a verdict in any case where the constitution accords the party the right to a jury trial, would be unconstitutional.[185] It is said, however, that the constitutional provision that the right of trial by jury shall remain inviolate does not necessarily mean trial by a jury of the vicinage. Juries were originally selected from the vicinage because, being so selected, they were more likely to have some independent knowledge of the matter to be tried. But this reason no longer exists, and at present the only reason for drawing a jury from the vicinage is found in the

[182] State v. McClear, 11 Nev. 39, 60.

[183] Dowling v. State, 5 Smedes & M. (Miss.) 664; People v. Kennedy, 2 Parker, Cr. R. (N. Y.) 312; Vaughn v. Scade, 30 Mo. 600; Lamb v. Lane, 4 Ohio St. 167; People v. Justices, 74 N. Y. 406.

[184] Work v. State, 2 Ohio St. 296.

[185] Opinion of Justices, 41 N. H. 550; Kleinschmidt v. Dunphy, 1 Mont. 118.

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convenience of parties and witnesses.[186] But an act which prohibits those who are not taxpayers from serving on juries is understood to conflict with the provisions of the seventh amendment to the federal constitution.[187] And it is clearly a part of the right of trial by jury, as the same existed at common law, that the parties should have the right to inquire into the qualifications and impartiality of the jurors, and be permitted to challenge such as are unfit to serve or are biased against them.[188] An act providing for "struck juries," on the demand of either party, is not in conflict with the constitutional provision that the right of trial by jury shall remain inviolate.[189]

Province of Court and Jury.

In a trial by jury the judge and jury have different, though related, duties and provinces. The facts are for the jury; the law for the court. And the jury, within their own province, are independent of the court; that is, they cannot be dictated to or controlled in respect to their verdict, if the case involves disputed questions of fact and conflicting testimony. It is the duty of the judge to decide questions of law arising in the course of the trial, and to instruct the jury as to the law which should govern the controversy. He should see that every case so goes to the jury that they have clear and intelligent notions of the points they are to decide, and to this end he should give necessary instructions, whether so requested by counsel or not.[190] It is not error for the court to direct the jury to return a particular verdict, when the evidence is so conclusive that it would be the duty of the court to set aside a different verdict as against the evidence, although there may be some slight conflict of testimony.[191] "Decided cases may be found where it is held that if there is a scintilla of evidence in support of a case the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to wit, that be-

[186] Taylor v. Gardiner, 11 R. I. 182. But compare Swart v. Kimball, 43 Mich. 443, 5 N. W. 635.

[187] Reece v. Knott, 3 Utah, 451, 24 Pac. 757.

[188] Palmore v. State, 29 Ark. 248; Paul v. Detroit, 32 Mich. 108.

[189] Lommen v. Gaslight Co. (Minn.) 68 N. W. 53.

[190] Owen v. Owen, 22 Iowa, 270.

[191] Corning v. Nail Factory, 44 N. Y. 577; National Exch. Bank of Boston v. White, 30 Fed. 412. But see Curry v. Curry, 114 Pa. St. 367, 7 Atl. 61.

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fore the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed." [192] The refusal of jurors to obey a peremptory instruction to find a verdict for one of the parties is reprehensible in the highest degree, and may subject them to punishment for contempt. In such a case, it is thought, the court would have authority to direct the entry of the proper verdict without the assent of the jury.[193] In some of the states the judges are expressly forbidden to express to the jury any opinion on the facts. But, where there is no such specific prohibition, it is not improper for the court to express to the jury its opinion upon the weight and character of the evidence, if in the end the question is left to the jury.[194] But it should be observed that such expressions of opinion as to the evidence are very different in character from the instructions of law. The latter are imperatively binding on the jury; not so the former. In the courts of the United States, the judges have the right to express their opinion on the evidence, and their authority in this particular is not controlled by state statutes forbidding such a practice to the state judges. "Trial by jury in the courts of the United States is a trial presided over by a judge with authority not only to rule upon objections to evidence and to instruct the jury upon the law, but also, when in his judgment the due administration of justice requires it, to aid the jury by explaining and commenting upon the testimony, and even giving them his opinion upon questions of fact, provided only he submits those questions to their determination." [195]

In What Proceedings Trial by Jury May be Claimed.

In view of the way in which the guaranty of trial by jury is expressed in the seventh amendment and in the state constitutions, as adverted to above, it is settled by the courts that the guaranty merely preserves this right and does not extend it. Consequently, a trial

[192] Commissioners of Marion Co. v. Clark, 94 U. S. 278.

[193] Cahill v. Railroad Co., 20 C. C. A. 184, 74 Fed. 285.

[194] Rowell v. Fuller's Estate, 59 Vt. 688, 10 Atl. 853.

[195] U. S. v. Philadelphia & R. R. Co., 123 U. S. 113, 8 Sup. Ct. 77; Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 7 Sup. Ct. 1.

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after this method may be claimed as a matter of constitutional right only in those cases where it could have been demanded, as of right, under the common or statutory law which was in force at the time the constitution was adopted.[196] The right of trial by jury, it is said, is secured by the guaranties of the various state constitutions in and for the various proceedings of legal cognizance in which that mode of trial was employed when the several constitutions were adopted, having regard always to the nature and character of the controversy, and not to the mere form of the action or proceeding. But it is not imposed upon substantially new rights and proceedings arising after the constitution.[197] And not every case which is not a criminal case is a civil one, wherein, by the constitution, the right of trial by jury shall remain inviolate; but that term embraces such as were treated as civil cases when the constitution went into effect.[198] At the same time, it is important to remember that it is not the form of the proceeding which governs here, but the question whether the case is of that general description to which trial by jury was anciently considered applicable. Consequently it may be said with propriety that the constitutional provisions apply to all controversies fit to be tried by a jury according to the rules of the common law, notwithstanding the particular right for the violation of which the action is brought did not exist at common law, but was created by a statute passed after the adoption of the constitution.[199] In the courts of the United States it is held, with regard to suits for penalties for smuggling, that if the action is against the master, it is triable by jury, but if against the vessel, it need not be so tried.[200]

Proceedings in Which the Privilege is not Claimable.

There are many varieties of proceedings or controversies in which, for the reasons just stated, a trial by jury cannot be claimed as a matter of constitutional right. For example, in the trial of claims

[196] Trigally v. Mayor, etc., 6 Cold. (Tenn.) 382; Copp v. Henniker, 55 N. H. 179; Harper v. Commissioners, 23 Ga. 566; People v. Phillips, 1 Edm. Sel. Cas. (N. Y.) 386; Ross v. Irving, 14 Ill. 171.

[197] Commissioners of Mille Lacs Co. v. Morrison, 22 Minn. 178.

[198] Lake Erie, W. & St. L. R. Co. v. Heath, 9 Ind. 558.

[199] Plimpton v. Somerset, 33 Vt. 283.

[200] U. S. v. The Queen, 4 Ben. 237, Fed. Cas. No. 16,107.

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against the government, the claimant has no constitutional right to a trial by jury. The government cannot be sued without its own consent. If it permits the judicial ascertainment and enforcement of claims against it, the proceedings thereon are not suits at common law. It may establish tribunals for the hearing of such claims and regulate their procedure as it may see fit. And the party has no other mode of establishing his claim than that pointed out by the statute. The allowance of such actions is an act of grace, and the government is under no obligation to accord him a trial by jury.[201] Again, the power to punish for contempts is incident to all courts of record. Cases of contempt of court were never triable by jury, but long before the adoption of the constitutions it was within the power of the court to proceed summarily in such cases. Moreover, the very object of such proceedings would be defeated in many instances if it were necessary to invoke the judgment of a jury. Consequently the summary punishment of contempts is no violation of the constitutional right of trial by jury.[202] So also, in the assessment and collection of taxes, the constitutional provisions relating to trial by jury do not apply; and the tax payer cannot complain of the mode of proceeding if he is given an opportunity to defend against the legality of the tax or the liability of his property before some competent board or tribunal.[203] In quo warranto proceedings, according to the opinion prevailing in some of the states, there is no constitutional right of trial by jury, although this is not everywhere admitted.[204] Neither is this mode of trial claimable as of right in divorce proceedings, unless especially made applicable thereto by law.[205] In proceedings for the appropriation of private property for public use, under the power of eminent domain, the owner has no constitutional right to a trial by jury, unless, as is the case in some of the states, the constitution expressly gives it. The proceeding is

[201] McElrath v. U. S., 102 U. S. 426.

[202] U. S. v. Hudson, 7 Cranch, 32; Ex parte Wall, 107 U. S. 265, 2 Sup. Ct. 569; Garrigus v. State, 93 Ind. 239; State v. Doty, 32 N. J. Law, 403.

[203] Cocheco Manuf'g Co. v. Strafford, 51 N. H. 455; Commissioners of Mille Lacs Co. v. Morrison, 22 Minn. 178; Harper v. Commissioners, 23 Ga. 566.

[204] See State v. Lupton, 64 Mo. 415; State v. Vail, 53 Mo. 97; People v. Albany & S. R. Co., 57 N. Y. 161; People v. Doesburg, 16 Mich. 133.

[205] Coffin v. Coffin, 55 Me. 361; Cassidy v. Sullivan, 64 Cal. 266, 28 Pac. 234.

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in the nature of an appraisement or arbitration, rather than a suit.[206] So again, the appointment of a guardian or committee for an insane person, a spendthrift, or an habitual drunkard, is not regarded as one of the cases in which a jury trial is preserved by the constitution.[207] And a statute authorizing the commitment of infants to the house of refuge, without a trial by jury, is constitutional.[208] So also, in proceedings supplementary to execution, the debtor is not entitled, under the constitutional guaranty, to a trial by jury.[209] Whether or not the trial by jury may be claimed as of right in proceedings to determine a contested election is still an unsettled question. In some of the states, the courts hold that such an issue may be determined without a jury; in others, a contrary opinion prevails.[210]

Equity Cases.

The distinction between actions at law and suits in equity was established in this country before the adoption of the constitutions, and in equity proceedings a jury was not employed. It results that those constitutional provisions which preserve the right of trial by jury, or declare that it shall remain "inviolate," do not extend the guaranty to equitable proceedings such as were used to be tried without a jury before the constitutions went into effect.[211] For example, the practice of uniting the legal cause of action for the mortgage debt with the equitable remedy in foreclosure, rendering the whole an equitable proceeding, existed in many of the states before the adoption of the constitutions, and hence the parties in such a proceeding cannot now claim a jury trial of the issue upon the debt.[212] But still, the legislature cannot convert a legal right into an equitable

[206] Pennsylvania R. Co. v. First German Congregation, 58 Pa. St. 445; Livingston v. Mayor of New York, 8 Wend. (N. Y.) 85; Butler v. Worcester, 112 Mass. 541.

[207] Gaston v. Babcock, 6 Wis. 503; Hagany v. Cohnen, 29 Ohio St. 83; Black Hawk Co. v. Springer, 58 Iowa, 417, 10 N. W. 791.

[208] Ex parte Crouse, 4 Whart. (Pa.) 9.

[209] Kennesaw Mills Co. v. Walker, 19 S. C. 104.

[210] Compare Ewing v. Filley, 43 Pa. St. 384; State v. Lewis, 51 Conn. 113; State v. Gleason, 12 Fla. 190; People v. Cicotte, 16 Mich. 283.

[211] Goodyear v. Providence Rubber Co., 2 Cliff. 351, Fed. Cas. No. 5,583; Wynkoop v. Cooch, 89 Pa. St. 450; Bellows v. Bellows, 58 N. H. 60.

[212] Stillwell v. Kellogg, 14 Wis. 461; Middletown Sav. Bank v. Bacharach, 46 Conn. 513; Carmichael v. Adams, 91 Ind. 526.

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right, so as to infringe upon the right of trial by jury.[213] For instance, the constitutional right to trial by jury applies to an action to abate a nuisance and recover the damage occasioned thereby, although the complaint is in form as for equitable relief and the prayer for damages may be regarded as incidental thereto.[214]

Admiralty Jurisdiction.

The judicial power of the United States is extended by the constitution to all cases of admiralty and maritime jurisdiction. But cases arising in the admiralty are not "suits at common law" within the meaning of the seventh amendment, and consequently the admiralty courts may proceed to the determination of causes properly before them without the aid of a jury; and this is the case even where the jurisdiction is extended to controversies which were not originally within the scope of the admiralty.[215]

Summary Proceedings.

There are certain kinds of proceedings (usually described as "summary") in which, by the ancient practice of the courts, a liability could be fixed upon persons connected with the court or with the course of proceedings therein, without the intervention of a jury. And these proceedings still remain lawful, notwithstanding the guaranties in the constitutions. Thus, a law authorizing summary proceedings by motion against a sheriff and his sureties for official misconduct, is no violation of the constitution.[216] So the sureties on bonds given in the course of judicial proceedings, such as appeal bonds, writ of error bonds, and bonds for costs, are liable to have judgment entered against them on such bonds without a trial by jury.[217]

Peremptory Nonsuits.

Notwithstanding some difference of opinion, it is now generally agreed that the right of trial by jury does not include the right to have the jury render a verdict in cases where the law is clearly

[213] Norris' Appeal, 64 Pa. St. 275.

[214] Hudson v. Caryl, 44 N. Y. 553; Hyatt v. Myers, 73 N. C. 232.

[215] Insurance Co. v. Dunham, 11 Wall. 1; Sheppard v. Steele, 43 N. Y. 52.

[216] Lewis v. Garrett, 5 How. (Miss.) 434.

[217] Bank of Columbia v. Okely, 4 Wheat. 235; Whitehurst v. Coleen, 53 Ill. 247; Gildersleeve v. People, 10 Barb. (N. Y.) 35; Young v. Wise, 45 Ga. 81.

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against the plaintiff. The jury are to try and determine the facts, but it is the court which must declare the law applicable to the facts. Consequently, when the judge, at the close of the plaintiff's evidence, orders a peremptory nonsuit, on the ground that, conceding all the facts which the jury could find from the evidence, those facts are not sufficient to establish a liability against the defendant, such action is no violation of the plaintiff's constitutional rights.[218]

Compulsory References.

In some of the states, before the adoption of the constitutions, the practice of ordering references, especially in cases involving the examination of a long account, was in use and sanctioned by law. In those jurisdictions, therefore, such a practice is still permissible, and a compulsory reference, in suitable cases, is no infringement of the constitutional rights of suitors.[219] But in the courts of some of the other states, as also in those of the United States, it is not lawful to deprive a party of his right to a trial by jury by compelling him, against his will, to submit his cause to the decision of arbitrators or referees.[220]

Restrictions on the Right.

The constitutions were intended not merely to secure the right of trial by jury, but also to insure that it should be continued in existence as a substantial and valuable protective right to private suitors. Now it is evident that it would be entirely feasible for a state legislature, if so minded, to impose such onerous and oppressive restrictions or conditions upon this right as to make it practically unavailing to a party for his protection, yet without denying it in express terms. But this would be a palpable violation of the spirit and intent of the constitutional provision, and the courts would hold any such restrictions upon the right as not less unconstitutional than the total denial of it.[221] But such a result could not be predi-

[218] Munn v. Mayor, etc., of Pittsburgh, 40 Pa. St. 364; Naugatuck R. Co. v. Waterbury Button Co., 24 Conn. 468. See Baylis v. Travelers' Ins. Co., 113 U. S. 316, 5 Sup. Ct. 494.

[219] Lee v. Tillotson, 24 Wend. (N. Y.) 337; Mead v. Walker, 17 Wis. 189.

[220] U. S. v. Rathbone, 2 Paine, 578, Fed. Cas. No. 16,121; Rhines v. Clark, 51 Pa. St. 96; Bernheim v. Waring, 79 N. C. 56.

[221] Flint River Steamboat Co. v. Foster, 5 Ga. 194.

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cated of any provisions which imposed conditions to the exercise of the right which were merely reasonable and not prohibitive limitations, and did not clog it unduly. For instance, there is no valid objection to a law requiring that a party who demands a trial by jury shall pay a reasonable jury fee.[222] And so a statute authorizing a judgment by default to be entered in case the defendant does not within a reasonable limited time file a sufficient affidavit of defense, is not an unreasonable restriction upon the right of trial by jury.[223] But on the other hand, it is held that an act making an auditor's report prima facie evidence of the facts found by him on the trial before the jury impairs the constitutional right of trial by jury. "If the jury can be compelled to give their verdict, not upon the issue between the parties, but upon the question whether an auxiliary decision of that issue is right, giving to that auxiliary decision as evidence of its own correctness such weight as the legislature chooses to prescribe, the constitutional guaranty of trial by jury is a delusion; and if that guaranty can be repealed by legislative circumlocution, every other constitutional guaranty is a constitutional farce."[224]

Jury Trial Allowed on Appeal.

It is generally considered that there is no impairment of the right of trial by jury, although the statute authorizes a justice of the peace or other inferior court or magistrate to decide causes without a jury, provided that the party who is compelled to submit his cause to the judgment of such a court is allowed an unrestricted right of appeal to a court which proceeds with the aid of a jury.[225] But the better opinion, in regard to criminal cases, is that the right of trial by jury means the right to such a trial in the first instance, and not a right to appeal from a conviction by a magistrate.[226] And it is not easy to discover the difference in principle between civil and criminal cases, in respect to the exercise of this right.

[222] Adams v. Corriston, 7 Minn. 456 (Gil. 365).

[223] Lawrance v. Borm, 86 Pa. St. 225; Dortic v. Lockwood, 61 Ga. 293.

[224] King v. Hopkins, 57 N. H. 334; Plimpton v. Somerset, 33 Vt. 283.

[225] Gaston v. Babcock, 6 Wis. 503; Haines v. Levin, 51 Pa. St. 412; Norristown Turnpike Co. v. Burket, 26 Ind. 53.

[226] Callan v. Wilson, 127 U. S. 540, 8 Sup. Ct. 1301; In re Dana, 7 Ben. 1, Fed. Cas. No. 3,554.

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Waiver of the Right.

By the constitutions of several of the states it is provided that the right of trial by jury may be waived by the parties in all civil issues. But even without this clause it would be entirely competent for those interested to agree that the court should proceed to determine the cause without a jury.[227] Accordingly, when the defendant has an opportunity to demand a trial by jury, and omits to do so, he cannot complain that his constitutional rights are denied him if the trial proceeds without a jury.[228] And so, where a default is suffered in an action for damages, the court may proceed to assess the damages. The defendant has no constitutional right to have them assessed by a jury.[229]

[227] Greason v. Keteltas, 17 N. Y. 491; Baird v. Mayor, etc., 74 N. Y. 382; Garrison v. Hollins, 2 Lea (Tenn.) 684.

[228] Flint River Steamboat Co. v. Foster, 5 Ga. 194; Leahy v. Dunlap, 6 Colo. 552; Foster v. Morse, 132 Mass. 354.

[229] Raymond v. Railroad Co., 43 Conn. 596; Hopkins v. Ladd, 85 Ill. 178.

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CHAPTER XIX.

POLITICAL AND PUBLIC RIGHTS.

224–229. Citizenship.
230. Double Citizenship in the United States.
231. Privileges of Citizens of the United States.
232–234. The Right of Suffrage.
235. Freedom of Speech and of the Press.
236. Same—Criticisms of Government.
237. Same—Censorship of the Press.
238–242. Same—Privileged Communications.
243. The Right of Assembly and Petition.
244. Disfranchisement.

CITIZENSHIP.

224. The fourteenth amendment to the federal constitution declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."

225. With respect to the manner of acquiring citizenship, the citizens of the United States are divided into two classes:

(a) Native born citizens.

(b) Naturalized citizens.

226. Citizenship in the United States is not restricted to adults or males, but belongs equally to women and children.

227. Corporations cannot be citizens of the United States.

228. The native Indians, though born within the United States, can become citizens only by naturalization.

229. The right of expatriation is fully recognized in this country.

Before the adoption of the fourteenth amendment, the rights and status of a citizen of the United States were very doubtful. It was

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even uncertain whether there was anything under the federal system corresponding to citizenship in the several states. Many publicists contended that if there was a citizenship of the United States, it was possessed by virtue of, and resulted from, citizenship in a state. This of course excluded from the definition of citizenship all the residents of the United States who were not citizens of some state, including the inhabitants of the territories and of the District of Columbia, Indians, and negroes. These persons, it was thought by some, were not citizens at all. In the Dred Scott Case, Chief Justice Taney stated that the question at issue was as follows: "Can a negro, whose ancestors were imported into this country and sold as slaves, become a member of the political community formed and brought into existence by the constitution of the United States, and as such become entitled to all the rights and privileges and immunities guarantied by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the constitution." And this question was answered in the negative.[1]

The purpose of the fourteenth amendment was to secure to the newly emancipated colored race the rights and privileges which belonged to them, since the abolition of slavery by the thirteenth amendment, in common with all others living under the protection of federal law. It conferred upon them citizenship in the United States, with all its privileges. It did not make them citizens of the states. But it gave them the right to acquire citizenship in a state, in addition to their federal citizenship, by residence therein. Though necessarily general in its terms, this amendment applies especially and peculiarly to these people. There have been very few cases in which its benefits have been invoked by any others. It is held that no white person born within the limits of the United States and subject to their jurisdiction, or born without those limits and subsequently naturalized, owes his status of citizenship to the amendment.[2] The promotion of colored persons to citizenship, by this provision, is an admission of them to all the rights and privileges of white citizens in the same manner and to the same extent. They cannot be distinguished from other citizens, by legislation, for

[1] Dred Scott v. Sandford, 19 How. 393, 403.

[2] Van Valkenburg v. Brown, 43 Cal. 43.

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any of the causes which previously characterized their want of citizenship.[3] But at the same time, it must be remembered that the fourteenth amendment does not add to the privileges or immunities of citizens, but only furnishes additional protection for the privileges already existing.[4]

Definition of Citizenship.

Citizenship is the status or character of being a citizen. And a citizen of a given state or country is one who owes it allegiance and is entitled to its protection.[5] The two correlative ideas of allegiance and protection form the basis of the legal and political conception of citizenship. The citizen is subject to the jurisdiction of his country and to its laws. He owes it loyalty, his services at need, and his money to defray its expenses. In return he is entitled to claim its protection against domestic violence and foreign oppression. The possession of civic rights is not the test of citizenship. There are many who are legally incapable of voting for public officers or of filling the offices themselves, who are none the less citizens. Neither is mere inhabitancy of a country a test of citizenship. For resident aliens owe a local and temporary allegiance to the state wherein they live and are amenable to its ordinary laws. But where the two characteristics of allegiance and protection are found in their completeness and together, there citizenship exists.

Native Born Citizens.

The fourteenth amendment divides the citizens of the United States into two classes. First, those who are born in the United States and subject to the jurisdiction thereof.[6] Second, those who are naturalized in the United States and subject to the jurisdiction thereof. In order to belong to the first class two things must con-

[3] Burns v. State, 48 Ala. 195.

[4] Minor v. Happersett, 21 Wall. 162.

[5] Allegiance is the obedience due to the sovereign; and persons born in the allegiance of the king are his natural subjects and no aliens. The allegiance is not limited to any spot, and is due to the king in his natural capacity, rather than his political capacity. Calvin's Case, 2 How. St. Tr. 559.

[6] An act of congress passed in 1866 provides that "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States." Rev. St. U. S. § 1992.

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cur. The person must have been born within the United States and subject to the jurisdiction thereof. This jurisdiction "must at the time be both actual and exclusive. The words mentioned except from citizenship children born in the United States of persons engaged in the diplomatic service of foreign governments, such as ministers and ambassadors, whose residence, by a fiction of public law, is regarded as a part of their own country. This extra-territoriality of their residence secures to their children born here all the rights and privileges which would inure to them had they been born in the country of their parents. Persons born on a public vessel of a foreign country, whilst within the waters of the United States and consequently within their territorial jurisdiction, are also excepted. They are considered as born within the country to which the vessel belongs. In the sense of public law, they are not born within the jurisdiction of the United States." [7] So if a stranger or traveler passing through the country, or temporarily residing here, but who has not himself been naturalized and who claims to owe no allegiance to our government, has a child born here, who goes out of the country with his father, such child is not a citizen of the United States, because he was not subject to its jurisdiction.[8] But the children, born within the United States, of permanently resident aliens, who are not diplomatic agents or otherwise within the excepted classes, are citizens. And this is true even where the parents belong to a race of persons (such as the Chinese) who cannot acquire citizenship for themselves by naturalization.[9] Children of American par-

[7] In re Look Tin Sing, 21 Fed. 905.

[8] Miller, Const. 279.

[9] In re Look Tin Sing, 21 Fed. 905; In re Wong Kim Ark, 71 Fed. 382. In the case last cited it was said: "At the common law, if the parent be under the actual obedience of the king, and the place of the child's birth be within the king's obedience as well as in the dominion, the child becomes a subject of the realm; in other words, birth within the realm was deemed conclusive. This was decided in Calvin's Case, reported by Lord Coke, 7 Coke, 1, and has always been recognized as the common-law doctrine. 1 Bl. Comm. 366; 2 Kent, Comm. 9; Lynch v. Clarke, 1 Sandf. Ch. (N. Y.) 583; U. S. v. Rhodes, 1 Abb. U. S. 28, Fed. Cas. No. 16,151. By the law of nations, birth follows the political status of the father, and of the mother when the child is illegitimate. Bar, Int. Law, § 31; Vatt. Law Nat. §§ 212–215; Sav. Priv. Int. Law, § 351. The fourteenth amendment to the constitution of the United States must be controlling upon the question presented for decision in this matter,

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ents born abroad are also considered as within the privilege of citizenship, if the residence of their parents abroad was only temporary. An act of congress, passed before the fourteenth amendment, but probably not repealed by it, provides that persons born out of the limits and jurisdiction of the United States, whose fathers are, at the time of such birth, citizens of the United States, shall be deemed and considered citizens of the United States; provided, however, that the rights of citizenship shall not descend to persons whose fathers never resided in the United States.[10] This statute is in affirmance of the common law. "By the common law, when a subject is traveling or sojourning abroad, either on the public business or on a lawful occasion of his own, with the express or implied license and sanction of the sovereign, and with the intention of returning, as he continues under the protection of the sovereign power, so he retains the privileges and continues under the obligations of his allegiance, and his children, though born in a foreign country, are not born under foreign allegiance, and are an exception to the rule which makes the place of birth the test of citizenship." [11] The infant children of

irrespective of what the common-law or international doctrine is. But the interpretation thereof is undoubtedly confused and complicated by the existence of these two doctrines, in view of the ambiguous and uncertain meaning of the qualifying phrase, 'subject to the jurisdiction thereof,' which renders it a debatable question as to which rule the provision was intended to declare. Whatever of doubt there may be is with respect to the interpretation of that phrase. Does it mean 'subject to the laws of the United States,' comprehending, in this expression, the allegiance that aliens owe in a foreign country to obey its laws; or does it signify 'to be subject to the political jurisdiction of the United States,' in the sense that is contended for on the part of the government? This question was ably and thoroughly considered in Re Look Tin Sing, supra, where it was held that it meant subject to the laws of the United States." The reader's attention is further directed to the case of Lynch v. Clarke, 1 Sandf. Ch. (N. Y.) 583, where the common-law rule of citizenship by birth within the jurisdiction is stated, recognized, and declared to be the law of the United States.

[10] Rev. St. U. S. § 1993. But one who was born in Canada, of parents of African blood born in Virginia and held there as slaves until they emigrated to Canada, does not, by removing to the United States, become a citizen. The case of such a person is not covered either by the fourteenth amendment or by the act of congress mentioned. Hedgman v. Board of Registration, 26 Mich. 51.

[11] Ludlam v. Ludlam, 31 Barb. (N. Y.) 486.

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aliens, though born out of the United States, if dwelling within the United States at the time of the naturalization of their parents, become citizens by such naturalization.[12]

Women and Children.

We have said that citizenship does not necessarily include the right of voting. This is apparent from the language of the fourteenth amendment, which does not declare that "all adult males" are citizens, but that "all persons" born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States. It follows from this that females and minors are equally citizens of the United States, if they fulfill the conditions as to birth or naturalization, as are those invested with the suffrage.[13]

Corporations.

Although a private corporation is regarded as a "person" for many legal purposes, yet as it can neither be born nor naturalized, it cannot be considered as a citizen of the United States, under the provisions of the amendment.[14]

Indians.

In regard to the Indians, it has been said: "Neither are the original inhabitants of the country citizens so long as they preserve their tribal relations and recognize the headship of their chiefs, notwithstanding that, as against the action of our own people, they are under the protection of the laws, and may be said to owe a qualified allegiance to the government. When living within territory over which the laws, either state or territorial, are extended, they are protected by and at the same time held amenable to those laws in all their intercourse with the body politic and with the individuals composing it. But they are also, as a quasi foreign people, regarded as being under the direction and tutelage of the general government, and subjected to peculiar regulations as dependent communities. They are 'subject to the jurisdiction' of the United States only in a much qualified sense, and it would obviously be inconsistent with the semi-independent character of such a tribe, and with the obedience they are expected to render to their tribal

[12] West v. West, 8 Paige (N. Y.) 433.

[13] Minor v. Happersett, 21 Wall. 162.

[14] Paul v. Virginia, 8 Wall. 168; Insurance Co. v. New Orleans, 1 Woods, 85, Fed. Cas. No. 7,052.

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head, that they should be vested with the complete rights, or, on the other hand, subjected to the full responsibilities, of American citizens." [15] And it is held that an Indian, born in the United States and a member of a tribe, cannot, by merely separating himself from his tribe and taking up his residence among white citizens, become a citizen and claim the right to vote. Said the court: "Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien though dependent power), although in a geographical sense born in the United States, are no more 'born in the United States and subject to the jurisdiction thereof,' within the meaning of the first section of the fourteenth amendment, than the children of subjects of any foreign government born within the domain of that government, or the children, born within the United States, of ambassadors or other public ministers of foreign nations. Such Indians, then, not being citizens by birth, can only become citizens in the second way mentioned in the fourteenth amendment, by being 'naturalized in the United States,' by or under some treaty or statute." [16]

Naturalization.

This is the act or process by which an alien, renouncing his allegiance to his former sovereign, is accepted as a citizen and invested with all the rights and privileges attaching to that status, the same as if he were a natural born subject of the government. The power to establish a uniform rule of naturalization is vested in congress by the constitution, and this power is exclusive of any like power in the states. This subject has been fully discussed in connection with the powers of congress.

Expatriation.

This is a correlative to naturalization, or rather, it is a pre-requisite to it. The right of expatriation is the right of a man to change his country and allegiance at will. It is the right, on removing from one land to another, to sever his political connection with the former, and be exempt from personal or political duties toward it, and to acquire the rights and standing of a citizen in the latter.

[15] 2 Story, Const. § 1933.

[16] Elk v. Wilkins, 112 U. S. 94, 5 Sup. Ct. 41.

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An act of congress declares that "expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness;" and "any declaration, instruction, opinion, order, or decision of any officer of the United States, which denies, restricts, impairs, or questions the right of expatriation, is inconsistent with the fundamental principles of the republic." [17] And the decisions of the courts are in accordance with this declaration.[18]

DOUBLE CITIZENSHIP IN THE UNITED STATES.

230. We have, in our political system, a government of the United States and a government of each of the several states. Each of these governments is distinct from the others, and each has citizens of its own, who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a state. But his rights of citizenship under one of these governments will be different from those which belong to him under the other.[19]

"The distinction between citizenship of the United States and citizenship of a state is clearly recognized and established [by the fourteenth amendment.] Not only may a man be a citizen of the United States without being a citizen of a state, but an important element is necessary to convert the former into the latter. He must reside within a state to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union. It is quite clear, then, that there is a citizenship of the United States and a citizenship of a state, which are distinct from each other and which depend upon different characteristics or circumstances in the individual." [20] A

[17] Rev. St. U. S. § 1999.
[18] In re Look Tin Sing, 21 Fed. 905.
[19] U. S. v. Cruikshank, 92 U. S. 542.
[20] Slaughterhouse Cases, 16 Wall. 36.

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person, therefore, may be a citizen of the United States without being a citizen of any particular state. And this is the condition of citizens permanently resident in the District of Columbia and in the territories.[21] Since the power of naturalization is exclusively vested in congress, the states cannot convert aliens into citizens of the United States. Whether the state can clothe an alien with the privileges of its own citizenship, in advance of his naturalization by federal law, is uncertain. But there is nothing to prevent the state from giving him the right of suffrage, the right to inherit and transmit property, and all other rights generally deemed to be appurtenant to citizenship, except the right to be subject to the federal jurisdiction and to claim the benefit of federal law as a citizen of the United States. On the other hand, the United States can naturalize a foreigner, but cannot make him a citizen of any particular state. That depends upon his own choice. He becomes a citizen of that state in which he shall reside. But the state cannot withhold the privileges of its citizenship from any person born or naturalized in the United States and subject to the jurisdiction thereof who shall choose to dwell within its domain. The most that the state can require is a bona fide intention to become one of its residents. And perhaps it is within the competence of the state to fix a term of residence within its limits before the rights of citizenship shall attach.

PRIVILEGES OF CITIZENS OF THE UNITED STATES.

231. The fourteenth amendment also declares that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

In this connection, it is important to observe that the privileges and immunities here protected are those of citizens of the United States (not of citizens of a state) and that they are such only as belong to those citizens in virtue of their citizenship. Another part of the constitution guaranties to the citizens of each state the privileges

[21] Prentiss v. Brennan, 2 Blatchf. 162, Fed. Cas. No. 11,385; Picquet v. Swan, 5 Mason, 35, Fed. Cas. No. 11,134.

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and immunities of citizens in the several states. But the fourteenth amendment is not supplementary to that clause and has no relation to it. It deals with a different matter, viz., the rights of citizens of the United States as such. It would perhaps be too narrow a construction to say that these rights must all be political in their character, or related to the status of citizenship. But it is clear that they must have some relation to the legitimate operations of the general government, to the purposes for which it was created, or to the powers which are committed to it.[22] The right of marriage, the right of the descent of property, the right to the control of children, the right to sue for property and to have it protected, and, in general, the protection of life, liberty, and the pursuit of happiness, are all founded in the relation between the state and its citizens, and are not rights which belong to the citizens of the United States as such. But the rights which they do possess in that character are also numerous and important. For example, in a case in which a state tax on interstate travel was held void, it was said to be the right of a citizen of the United States "to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the subtreasuries, land offices, and courts of justice in the several states."[23] So it was said in another case: "Another privilege of a citizen of the United States is to demand the care and protection of the federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. The right to peaceably assemble and petition for a redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guarantied by the federal constitution. The right to use the navigable waters of the United States however they may penetrate the territory of the several states, and all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States and not citizenship of a state. One of these privileges is conferred by the very article under consideration. It is, that a citizen of the United States can, of his own voli-

[22] Kirtland v. Hotchkiss, 100 U. S. 491.

[23] Crandall v. Nevada, 6 Wall. 35.

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tion, become a citizen of any state, by a bona fide residence therein." [24] Without attempting a complete enumeration, we may add several to the catalogue of rights herein given. Thus, it is undoubtedly a right of a citizen of the United States as such to share with others in the benefit of the postal system, to have access to the courts of the United States without let or hindrance by the states, to inspect the records of those courts, to take advantage of the laws opening the public lands to settlement or purchase, to take out patents or copyrights, to buy, sell, or devise United States securities, to take the benefit of national bankrupt laws, and all this without any abridgment, hindrance, or taxation by the states.[25]

But the right to be admitted to practice law as a member of the bar is not one of the privileges or immunities of citizens of the United States. It is a special right, or privilege, conferred or withheld at the option of the state legislatures, and has not any necessary connection with citizenship.[26] Nor is the right to engage in the sale

[24] Slaughterhouse Cases, 16 Wall. 36.

[25] The exercise by a citizen of the United States of the right to make a homestead entry upon unoccupied public lands, conferred by act of congress, is the exercise of a right secured by the constitution and laws of the United States. U. S. v. Waddell, 112 U. S. 76, 5 Sup. Ct. 36. In the case of Logan v. U. S., 144 U. S. 263, 12 Sup. Ct. 617, the fact is brought out that there are rights of citizens of the Union, as such, not specifically created by any clause of the constitution, but derivable from the supremacy of the federal government within its own sphere. Gray, J., observed: "Every right created by, arising under, or dependent upon the constitution of the United States may be protected and enforced by congress by such means and in such manner as congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the constitution, may in its discretion deem most eligible and best adapted to attain the object. . . . In the case at bar, the right in question does not depend upon any of the amendments to the constitution, but arises out of the creation and establishment, by the constitution itself, of a national government, paramount and supreme within its sphere of action. Any government which has power to indict, try, and punish for crime, and to arrest the accused and hold them in safekeeping until trial, must have the power and the duty to protect against unlawful interferences its prisoners so held, as well as its executive and judicial officers charged with keeping and trying them."

[26] Bradwell v. State, 16 Wall. 130.

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of any articles which, in consequence of their effect upon the public safety, the public health, or the public morals, are fit subjects for the exercise of the police power of the states. Thus, it is not one of the privileges of national citizenship to traffic in intoxicating liquors free from all regulation or restriction by the states.[27] And so a "trial by jury in suits at common law pending in the state courts is not a privilege or immunity of national citizenship, which the states are forbidden by the fourteenth amendment to abridge. A state cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the constitution is met if the trial is had according to the settled course of judicial proceedings."[28] Neither, as we shall presently see, is the right of suffrage a privilege of citizens of the United States.

THE RIGHT OF SUFFRAGE.

232. The right of suffrage is a political right, and is regulated by each government in accordance with its own views of policy and expediency.

233. In this country the right to vote is not conferred or guarantied by the federal constitution, but is left to be fixed and regulated by the several states, subject, however, to the limitations contained in the fourteenth and fifteenth amendments.

234. Where the constitution of the state defines the qualifications of those who shall be vested with the elective franchise, such qualifications cannot be altered by the legislature. But this does not deprive the legislature of the power to regulate the exercise of the right or the manner of conducting elections.

"Suffrage" means a vote, the act of voting, or the right or privilege of casting a vote at public elections. The term is not usually

[27] Bartemeyer v. Iowa, 18 Wall. 129.

[28] Walker v. Sauvinet, 92 U. S. 90. And see Iowa Cent. Ry. Co. v. Iowa, 160 U. S. 389, 16 Sup. Ct. 344.

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applied to the prerogative of voting at elections held by corporations or other private associations, but is restricted to such elections as are held under authority of government, general or local. The right of suffrage is also popularly called "the elective franchise."

It has sometimes been contended that the right to take part in the administration of government or in the choice of those who are to make and execute the laws, by means of the ballot, is a natural right, standing in the same category with the rights of life, liberty, and property. It is perhaps true that those who are affected by the operations of government, and who are capable of exercising an independent and intelligent will in the choice of means or agents for carrying on its functions, should be admitted, without distinction as to sex, age, or race, to the privilege of expressing that will at the polls, and that this universality of suffrage is implied in the theory of a representative government. But it remains not less true that the right of suffrage is not a natural right, but a political right; not a personal right, but a civil right. It does not owe its existence to the mere fact of the personality of the individual, but to the constitution of civil government. Nor is it even a necessary attribute of citizenship. It is conferred, limited, or withheld at the pleasure of the people acting in their sovereign capacity. Each state may define it in its own constitution or empower its legislature to do so. And the right of suffrage once granted may be taken away by the exercise of sovereign power, or forfeited for crime, under the laws of the state; and if taken away by the same power which granted it, by the alteration of the constitution, no vested right is violated.[29]

Federal Constitution does not Confer Right of Suffrage.

As a general rule, and except in some few details, the constitution of the United States does not regulate the right of suffrage, even as regards the choice of its own officers. The matter is left to the states. They grant or withhold the right of voting and determine the qualifications of those who shall possess it. In the case of Minor v. Happersett,[30] the supreme court of the United States declared that

[29] Ridley v. Sherbrook, 3 Cold. (Tenn.) 569; Anderson v. Baker, 23 Md. 531; People v. Barber, 48 Hun, 198; Boyd v. Mills, 53 Kan. 594, 37 Pac. 16.

[30] 21 Wall. 162. And see U. S. v. Anthony, 11 Blatchf. 200, Fed. Cas. No. 14,459; Van Valkenburg v. Brown, 43 Cal. 43.

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they were "unanimously of the opinion that the constitution of the United States does not confer the right of suffrage upon any one." But in a later decision the court explained that it did not intend thereby to say that when the class or the person entitled to vote at federal elections was ascertained by state laws, his right to vote for a member of congress was not fundamentally based upon the constitution, which created the office of member of congress, and declared that it should be elective, and pointed to the means of ascertaining who should be the electors. In the earlier case, the court was merely combating the argument that the right of suffrage was conferred by the constitution upon all citizens, and therefore upon women as well as men.[81]

Qualifications Determined by the States.

The federal constitution, in providing that "the house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature," simply adopts, with reference to congressional elections, the qualifications which each state may prescribe for its own electors. The state, if it admits given persons to vote for the members of its own lower house, cannot exclude the same persons from voting for members of congress. But, subject only to the limitations of the fourteenth and fifteenth amendments, to be hereafter noticed, it rests entirely in the discretion of the state to prescribe the qualifications of such persons. The result is that there is a singular and anomalous lack of uniformity in the qualifications of those persons who elect the federal house of representatives, and, indirectly, the senate and the President. In several of the states, unnaturalized foreigners, after they have resided a certain time within the state, are given the right to vote. In some states, the privilege of the ballot is extended to women. In some, there is a property qualification. In others, there is an educational qualification. But the constitution has not given to the national government the power to establish a uniform rule as to the qualifications of its own electors. Congress may indeed make regulations as to the time, place, or manner of holding elections for

[81] Ex parte Yarbrough, 110 U. S. 651, 4 Sup. Ct. 152.

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senators or representatives, or alter those directed to be made by the states. (Const. art. 1, § 4.) But this does not touch the qualifications of the voters.

One more clause of the federal constitution requires notice in this connection. It is the second section of the fourteenth amendment, which provides that when the right to vote is denied by any state to any of its male inhabitants who are twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, then the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state. The purpose of this clause was of course to induce the states to extend the elective franchise to the colored race. But this was made obligatory by the fifteenth amendment. Still, the language of the clause under consideration is general. And it is possible to conceive of cases where, without any reference to race or color, the states might so restrict the right of suffrage as to render themselves liable to have their representation reduced.

The right to fix the qualifications of its electors being thus vested in the state, subject to the few limitations above considered, it may proceed to determine what persons shall be excluded from this privilege, according to its own views of justice and policy. For the most part, aliens and non-residents are excluded. But, as already observed, the state may, if it chooses, confer the right to vote upon resident unnaturalized foreigners. And since suffrage is not a necessary attribute of federal citizenship, it would be competent for the state to withhold the elective franchise from naturalized persons until they have resided a certain time within its limits. Naturalization makes a man a citizen both of the United States and of the state where he resides. But many other persons who are citizens have not the right to vote. "Each state has the undoubted right to prescribe the qualifications of its own voters. And it is equally clear that the act of naturalization does not confer on the individual naturalized the right to exercise the elective franchise. While other civil rights are conferred by it, that of voting at elections for officers of the state is not one, unless the party possess the other requisite qualifications, defined by the state law, where citizenship is one

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of the necessary requisites to its exercise." [32] In most of the states, women are not invested with this privilege, and in all, minors are excluded. Persons mentally incapable of exercising a choice are generally excluded. And it is entirely competent for the state to make the ability to read and write a condition for registration for election purposes.[33] In many states, also, it is provided that conviction of an infamous crime shall deprive the offender of the right of suffrage. But inspectors of elections have no right to exclude the vote of an individual on the ground that the person offering it is a criminal, where there is no evidence produced before them of the conviction of such person for such crime and his consequent forfeiture of the rights of citizenship.[34]

Fifteenth Amendment.

The fifteenth amendment to the constitution of the United States provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." Of this provision it has been said: "The fifteenth amendment does not confer the right of suffrage upon any one. It prevents the states or the United States, however, from giving preference in this particular to one citizen of the United States over another on account of race, color, or previous condition of servitude. Before its adoption, this could be done. It was as much within the power of a state to exclude citizens of the United States from voting on account of race, etc., as it was on account of age, property, or education. Now it is not. If citizens of one race, having certain qualifications, are permitted by law to vote, those of another, having the same qualifications, must be. Previous to this amendment there was no constitutional guaranty against this discrimination; now there is. It follows that the amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of congress. This right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude." [35] But it will be ob-

[32] Spragins v. Houghton, 3 Ill. 377.

[33] Stone v. Smith, 159 Mass. 413, 34 N. E. 521.

[34] Gotcheus v. Matheson, 58 Barb. (N. Y.) 152.

[35] U. S. v. Reese, 92 U. S. 214; U. S. v. Harris, 106 U. S. 629, 637, 1 Sup. Ct. 601; U. S. v. Crosby, 1 Hughes, 448, Fed. Cas. No. 14,893.

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served that it remains within the power of the state to prescribe such qualifications for the suffrage as it may please, provided that they apply equally to persons of all races and colors.[36] Thus the amendment does not give to negroes the right to vote independently of such restrictions and regulations (for example, as to age and residence) as are imposed by the state constitution on white citizens.[37] But the amendment, being a part of the supreme law of the land, had the effect to annul those provisions of the constitutions of several of the states which restricted the exercise of the right of suffrage to white persons.[38]

Qualifications Fixed by State Constitution.

Where the constitution of a state (as is usually the case) fixes the qualifications of those who are to enjoy the right of suffrage, it is the intention that the standards so set up shall remain unalterable until the popular will changes to such an extent as to involve an alteration of the organic law. In this case, it is not within the constitutional power of the state legislature to alter, modify, or dispense with the qualifications determined by the constitution. It is not lawful to enact statutes which would either exclude persons admitted by the constitution, or admit persons whom the constitution would shut out. No new or different qualifications can be prescribed, nor can any of those named by the constitution be abrogated.[39]

Regulation of Elections.

When the constitution of a state prescribes certain qualifications for voters, this contemplates and intends that the legislature shall provide some mode of ascertaining and determining the existence of those qualifications. Consequently a law requiring the registration of voters is not invalid, unless it puts such unreasonable restrictions upon the right of suffrage as operate actually to exclude from its

[36] Narr, Suffrage & Elections, 1; Morse, Citizenship, § 143.

[37] Anthony v. Halderman, 7 Kan. 50.

[38] Wood v. Fitzgerald, 3 Or. 568.

[39] Chase v. Miller, 41 Pa. St. 403; McCafferty v. Guyer, 59 Pa. St. 109; State v. Adams, 2 Stew. (Ala.) 231, 239; State v. Tuttle, 53 Wis. 45, 9 N. W. 791; Bourland v. Hildreth, 26 Cal. 161.

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exercise persons or classes of persons entitled thereto.[40] So also the legislature may make rules relating to the method of voting, the giving of notice of elections, the creation and functions of election officers, the sufficiency of ballots, the powers and duties of canvassing boards, and to punish fraud, violence, intimidation, bribery, and similar offenses. The statutes enacting what is commonly called the "Australian ballot law" or system of secret voting, have been generally sustained as constitutional in all their leading particulars.[41] And when the constitution provides that only ballots delivered to voters within the polling place by the proper official shall be counted, this empowers the legislature to provide that no ballot shall be counted unless indorsed "official ballot," and also with the name or initials of the judge of election.[42] It is also held that there is no constitutional objection to a law regulating the machinery of a political party in making nominations of candidates for public office.[43]

The federal constitution provides that "the times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof, but the congress may at any time make or alter such regulations, except as to the place of choosing senators." It is held that this section gives congress a supervising power over the subject, and it may either make new regulations, or add to or modify those made by the state law; and any regulations made by it which are inconsistent with those of the state will necessarily supersede the state regulations.[44] While this provision adopts the state qualification as the federal qualification for the voter, his right to vote is based upon the constitution, and not upon the state law; and congress has the constitutional power to pass laws for the free, pure, and safe exercise of this right.[45]

[40] Mills v. Green, 67 Fed. 818; Mayor, etc., of Madison v. Wade, 88 Ga. 699, 16 S. E. 21; People v. Hoffman, 116 Ill. 587, 5 N. E. 596.

[41] See De Walt v. Bartley, 146 Pa. St. 529, 24 Atl. 185; Rogers v. Jacob, 88 Ky. 502, 11 S. W. 513; Common Council of Detroit v. Rush, 82 Mich. 532, 46 N. W. 951; Cook v. State, 90 Tenn. 407, 16 S. W. 471.

[42] Slaymaker v. Phillips (Wyo.) 42 Pac. 1049.

[43] In re House Bill No. 203, 9 Colo. 631, 21 Pac. 474.

[44] Ex parte Siebold, 100 U. S. 371; Ex parte Clarke, Id. 399.

[45] Ex parte Yarbrough, 110 U. S. 651, 4 Sup. Ct. 152.

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FREEDOM OF SPEECH AND OF THE PRESS.

235. The first amendment to the constitution of the United States provides that congress shall make no law abridging the freedom of speech or of the press; and similar guaranties of liberty of speech and publication have been incorporated in the constitutions of the several states.

Meaning of Terms.

In respect to the privileges secured by this guaranty, and with regard to responsibility for its abuse, there is no difference between "speech" and "the press." It is a mistake to suppose that there is a liberty of speech and a liberty of the press which are in any way different or distinct. The constitutional provision is designed to insure freedom for the expression of opinion; and it makes no difference whatever whether the opinion be expressed orally or in print.

No Peculiar Privilege of Newspapers.

It has often been claimed that the publishers of newspapers, in view of the peculiar nature of their business of gathering and disseminating news, should have a more liberal exemption from liability to the law of libel than persons engaged in other occupations. But this claim has never been conceded by the courts. "The publisher of a newspaper," it is said, "possesses no immunity from liability in publishing a libel, other or different than any other person. The law makes no distinction between the newspaper publisher and any private person who may publish an article in a newspaper or other printed form; and if either abuses the right to publish his sentiments on any subject and upon any occasion, he must defend himself upon the same legal ground." [46]

No New Right Created.

It is to be noticed that the constitutional guaranty here considered does not create any new right not previously understood to belong to the people. The language of the federal constitution, in declaring that congress shall make no law "abridging" the freedom of speech and of the press, implies that such freedom already ex-

[46] Bronson v. Bruce, 59 Mich. 467, 26 N. W. 671; Sweeney v. Baker, 13 W. Va. 158; King v. Root, 4 Wend. (N. Y.) 113.

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isted, and only intends that it shall not be impaired by any federal legislation. The same construction is also to be put upon the similar provisions in the state constitutions. It follows that, in determining the nature of this freedom and its limitations, we are to have recourse to the law as it existed at the time of the adoption of the constitutions, and that contemporary history may be consulted in order to ascertain the meaning of the language employed.

Meaning of the Guaranty.

"It is plain," says Story, "that the language of this amendment imports no more than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so always that he does not injure any other person in his rights, person, property, or reputation, and so always that he does not thereby disturb the public peace, or attempt to subvert the government." [47] According to the supreme court of Ohio, "the liberty of the press, properly understood, is not inconsistent with the protection due to private character. It has been well defined as consisting in the right to publish, with impunity, the truth, with good motives and for justifiable ends, whether it respects government, magistracy, or individuals." [48] As respects criticisms upon public officials or the government of the state or country, however, it is now thoroughly understood that freedom of the press includes not only exemption from previous censorship, but also immunity from punishment or sequestration after the publication, provided that the comments made keep within the limits of truth and decency, and are not treasonable. The importance of this guaranty as a protection against tyrannous oppression, and as a mainstay of popular government, cannot be exaggerated. Says the same learned commentator: "A little attention to the history of other countries in other ages will teach us the vast importance of this right. It is notorious that even to this day in some foreign countries it is a crime to speak on any subject, religious, philosophical, or political, what is contrary to the received opinions of the government or the institutions of the country, however laudable may be the design or however virtuous may be the motive. Even to animadvert upon the

[47] 2 Story, Const. § 1880.

[48] Cincinnati Gazette Co. v. Timberlake, 10 Ohio St. 548.

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conduct of public men, of rulers, or representatives, in terms of the strictest truth and courtesy, has been and is deemed a scandal upon the supposed sanctity of their stations and characters, subjecting the party to grievous punishment. In some countries no works can be printed at all, whether of science or literature or philosophy, without the previous approbation of the government." [49]

Limitation by Law of Libel and Police Regulations.

Freedom of speech and of the press does not mean unrestrained license. It cannot for a moment be supposed that this guaranty gives to every man the right to speak or print whatever he may choose, no matter how false, malicious, or injurious, without any responsibility for the damage he may cause. The guaranty does not do away with the law of liability for defamation of character. On the contrary, that law is not only consistent with liberty of speech and of the press, but is also one of the safeguards of those who may use, but do not abuse, this liberty. By the common law, and by statute law in the states, one who publishes libelous attacks upon another, with malicious intent to do him injury, is amenable to the criminal law; and there is also a liability in damages to the party injured. Exceptions to this rule are found in the case of what are called "privileged communications." These will be noticed later.

The liberty of the press is also limited, but not abridged, by laws passed in the exercise of the police power, for the protection of the moral health of the community. At common law, blasphemous publications, and also all such as tended, by their obscenity or indecency, to debauch the minds of the public and corrupt their morals, were punishable. And it is undoubtedly within the competence of the several states to enact laws for the punishment of such offenses, without infringing upon private rights secured by the guaranty of free speech. Thus, the constitutional provision does not prevent a state legislature from enacting laws intended to prevent the publication and sale of newspapers especially devoted to the publication of scandals and accounts of obscene and immoral conduct.[50]

[49] 2 Story, Const. § 1881. Under this constitutional provision, the legislature has no power to pass an act "to prohibit the active participation in politics of certain officers of the state government." Louthan v. Com., 79 Va. 196.

[50] In re Banks, 56 Kan. 242, 42 Pac. 693; Preston v. Finley, 72 Fed. 850. But a city cannot pass an ordinance declaring a named newspaper a public

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The same power belongs to the United States, within the territory subject to its exclusive jurisdiction and with respect to the subjects committed to its exclusive care. Thus, the act of congress prohibiting the use of the mails for the transmission of obscene matter is not unconstitutional as being in contravention of the first amendment.[81]

SAME—CRITICISMS OF GOVERNMENT.

236. The guaranty of free speech and publication secures to the citizen the right freely to criticise the nature, operations, institutions, plans, or measures of the government, provided only that such criticisms are not made with a purpose of inciting the people to treason or rebellion.

English Law of Seditious Libels.

In Great Britain, "every person commits a misdemeanor who publishes (verbally or otherwise) any words or any document with a seditious intention. Now, a seditious intention means an intention to bring into hatred or contempt or to excite disaffection against the queen or the government and constitution of the United Kingdom as by law established, or either house of parliament, or the administration of justice, or to excite British subjects to attempt otherwise than by lawful means the alteration of any matter in church or state by law established, or to promote feelings of ill will and hostility between different classes. And if the matter published is contained in a written or printed document, the publisher is guilty of publishing a seditious libel. The law, it is true, permits the publication of statements meant only to show that the crown has been misled, or that the government has committed errors, or to point out defects in the government or constitution with a view to their legal remedy, or with a view to recommend alterations in church or state by legal means, and, in short, sanctions criticism on public affairs which is bona fide intended to recommend the reform of existing institutions by legal methods. But any one will see at once

nuisance and forbidding its sale in the city. Ex parte Neill, 32 Tex. Cr. R. 275, 22 S. W. 923.

[81] U. S. v. Harmon, 45 Fed. 414.

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that the legal definition of a seditious libel might easily be so used as to check a great deal of what is ordinarily considered allowable discussion, and would, if rigidly enforced, be inconsistent with prevailing forms of political agitation." [52] This remains the law of England to the present day.

Prosecutions for seditious libel have been very numerous and unsparing in several periods of English history, particularly during the civil wars and under the early Hanoverian monarchs.[53] This method of repressing the expression of public opinion was a powerful engine in the hands of the crown and ministers, but was wielded with such severity, and enforced with such dangerous encroachments upon the fundamental rights and liberties of individuals, as to arouse storms of popular indignation, and excite the very disaffection which it was intended to subdue. Conspicuous illustrations of criminal proceedings of this sort are found in the trial of Wilkes, the author of the "North Briton,"[54] in 1764, and of the printers and publishers of the "Letters of Junius," a few years later. Beside the main question involved in cases of this kind, as to the natural right of free thought and speech, great popular resentment was incurred by the officers and judges of the crown for the manner in which such trials were conducted. Not only were they prosecuted with the utmost rigor, and followed by the most cruel punishments, but by

[52] Dicey, Const. (4th Ed.) 231, 232.

[53] In 1791, the attorney general stated that in the last 31 years there had been 70 prosecutions for seditious libel, and about 50 convictions; 12 had received severe sentences, and in 5 cases the pillory had formed part of the punishment. 2 May, Const. Hist. p. 112. Such prosecutions were not unknown in the American colonies. In 1735, in New York City, John Peter Zenger, a printer and publisher of a newspaper, was tried on a criminal information filed by the attorney general for seditious libel. The gist of the charge was his having published in his newspaper criticisms of the governor and council of the province of New York, charging them with injustice, tyrannical encroachments upon the rights of the people, and illegal actions in their official character. After a trial in which the most strenuous efforts were made to bring about his conviction, and as able efforts in his defense, the jury brought in a verdict of not guilty, in the teeth of the charge of Chief Justice De Lancey. After the trial, the mayor and council of New York presented the freedom of the city, in a gold box, to Andrew Hamilton, counsel for Zenger. Zenger's Case, 17 How. St. Tr. 675.

[54] Wilkes' Case, 19 How. St. Tr. 1075.

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means of ex officio informations filed by the attorney general the prisoner was deprived of his right to the intervention of a grand jury, and by the rulings of Lord Mansfield (that the jury were to pass upon the question of publication alone, leaving the criminality of the alleged libel to be decided by the court) the defendant was practically debarred from the hope of an acquittal by the firmness and courage of his peers. Moreover, general warrants[55] were issued, authorizing officers to search private houses and papers for the evidences of guilt under these laws. But the strength of public opinion was not without its effect. Fox's Libel Act reversed the rule laid down by Lord Mansfield, and made the jury judges of the law in libel cases. General warrants were declared illegal. And although the attorney general's information still supplied the place of an indictment, there ensued a brief period when prosecutions of this sort were more rarely brought, and, when pressed, more frequently resulted in acquittal, as juries gathered more courage. But during the period of the French Revolution, the fears of the government being much excited by the spread of democratic opinions and the circulation of Jacobin literature and tractates favorable to the right of revolution, the law against seditious libels was again put into active and unrelenting operation, both in England and Scotland. Until the closing years of the century, persecution of the press was rife, and although it is true that many pestilent and irresponsible agitators were justly punished for abuses of the liberty of speech, yet it is equally true that there were numerous examples of tyrannical sentences imposed upon the leaders of public opinion. During the next generation, prosecutions for libels upon the government were of less frequent occurrence; but they continued to be used as an occasional weapon in the hands of the ministry in power until about 1830, by which time, it is said, the temper of the people was such that they would no longer bear with complacency a harsh execution of the libel laws. "Since that time, the utmost latitude of criticism and invective has been permitted to the press in discussing public men and measures. The law has rarely been appealed to, even for the exposure of malignity and falsehood. Prosecutions for libel, like the censorship, have fallen out of our constitutional system. When

[55] See ante, p. 503.

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the press errs, it is by the press itself that its errors are left to be corrected." [56]

Press Laws of Continental Europe.

In most of the countries on the continent of Europe, the press is subjected, more or less fully, to the supervision of the government, and its freedom of expression is restricted by severe laws. In Russia, there exists an official censorship, and no books or papers are allowed to be printed, or sold upon their importation from abroad, until they have been approved by the imperial censors. In Germany and Italy, while there is no previous censorship, newspapers, and even private writers, are required to observe the utmost circumspection in their comments upon public affairs. Criticisms of the rulers, in either their public or private capacity, may be construed as "lese majesté," and punished by fine or imprisonment. Animadversions upon the conduct of the government, or upon its policy, plans, or management of the national affairs, if displeasing to those in power, may be followed by the sequestration of the offending journal and fines imposed upon its publishers.

Criticism of Government in America.

In our own country, the freedom of the press, in its relations to the government, is absolute. There are no laws to restrain the widest and fullest discussion of the affairs of the public and the most ardent and impassioned criticism of governmental policy and acts. Even opinions hostile to our system of government and our institutions are allowed perfectly free expression. Even the anarchist is not punished for his incendiary utterances, nor subjected to any restraint until he commits a breach of the peace. But publications relating to conspiracies to subvert the government, or tending to incite the people to treason or rebellion, would not be within the reason which protects the freedom of the press. The only known example in America of an attempt to restrain seditious publications was the Sedition Law of 1798. This act of congress provided for the punishment of all unlawful combinations and conspiracies to oppose the measures of the government, or to impede the operation of

[56] 2 May, Const. Hist. p. 213. The reader will find an excellent historical discussion of this subject in the volume referred to, on pages 102–213.

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the laws, or to intimidate and prevent any officer of the United States from undertaking or executing his duty. It also provided for a public presentation and punishment, by fine and imprisonment, of all persons who should write, print, utter, or publish any false, scandalous, and malicious writing or writings against the government of the United States, or either house of congress, or the President, with an intent to defame them or bring them into contempt or disrepute, or to excite against them the hatred of the good people of the United States, or to excite the people to oppose any law or act of the President in pursuance of law or his constitutional powers, or to resist or oppose or defeat any law, or to aid, encourage, or abet any hostile designs of any foreign nation against the United States. But this act was one of the principal causes of the downfall of the party which enacted it, was always regarded as foreign to the spirit of our institutions, and was consigned to oblivion, after a brief career, without regret.

SAME—CENSORSHIP OF THE PRESS.

237. The constitutional guaranty of freedom of speech and of the press forbids any censorship of the press, or any requirement of official approval or license as a condition precedent to publication.

In England, a decree of the court of star chamber limited the number of printers and of presses, and prohibited new publications unless previously approved by proper licensers. After the fall of this jurisdiction, the parliament assumed the same power during the period of the commonwealth, and after the restoration of Charles II. a statute on the same subject was passed founded principally upon the star chamber decree. This act was continued for some years after the Revolution of 1688. Many attempts were made by the government to keep it in force, but it was not strongly resisted by parliament, and it expired in 1694, and has never since been revived. "To this very hour," says Story, "the liberty of the press in England stands upon this negative foundation. The power to restrain it is dormant, not dead. It has never constituted an article of any of her numerous bills of rights; and that of the Revolution of 1688, after

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securing other civil and political privileges, left this without notice, as unworthy of care or fit for restraint." [87] As an example of a species of restraint of the press which still exists in England, though perhaps somewhat in the nature of a police regulation, we may mention an act of parliament passed in 1843, which provides that all new plays must be submitted to the lord chamberlain for his examination and approval; and when he shall be of the opinion that it is fitting for the preservation of good manners, decorum, or of the public peace so to do, he may forbid the acting or representation of any such play or part thereof anywhere in Great Britain or in such theaters as he may specify, and either absolutely or for such time as he shall see fit.[88] Censorship of the press, as we have mentioned, still exists in a rigorous form in Russia. But in the United States, no such restraint upon the freedom of publication has ever been attempted, or would for a moment be tolerated. It is clearly and indubitably prohibited by the constitutional provisions under consideration.

SAME—PRIVILEGED COMMUNICATIONS.

238. In the law of libel and slander, "privilege" means the exemption of the person uttering or publishing the matter complained of from responsibility, civil or criminal, although the words may have caused damage and may be in fact false. Privilege is of two kinds:

(a) Absolute.

(b) Conditional.

239. Absolute privilege exempts from all responsibility without any consideration of motive or design.

240. Conditional privilege protects the person in case his statement, though unfounded in fact, was made for proper ends and from justifiable motives.

241. Absolute privilege attaches to statements made, in the line of their duty, by—

(a) Members of the legislative bodies.

[87] 2 Story, Const. § 1882.

[88] Stat. 6 & 7 Vict. c. 68.

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(b) The principal officers of the executive branch of the government.

(c) Participants in judicial proceedings.

242. Conditionally privileged communications include the following:

(a) Published reports of judicial proceedings.

(b) Criticisms of public officers.

(c) Criticisms of candidates for public office.

(d) Criticisms of courts and judges.

(e) Criticisms of literary compositions.

Absolute Privilege—Legislators.

One of the highest kinds of privilege known to the law is that of the members of legislative bodies, in respect to utterances or publications made by them in the discharge of their public duties. The federal constitution provides that senators and representatives "for any speech or debate in either house shall not be questioned in any other place." Article 1, § 6. And similar provisions are found in the constitutions of most, if not all, of the states. This privilege ought not to be construed strictly, but liberally. It should not be confined to delivering an opinion, uttering a speech, or haranguing in debate, but extended to the giving of a vote, to the making of a written report, and to every other act resulting from the nature and in the execution of the office, whether upon the floor of the house or in committees, and also in the official publications of the proceedings of the legislative body.

Same—Public Officers.

While inferior public officers are amenable to the laws if they attempt to make their office a cover for malicious and unfounded attacks upon private character, yet it is not to be supposed that the chief executive magistrates of the Union and the states could be held accountable in the courts for anything said or published by them in their official capacity and in the line of their official duty, however injuriously their utterances may reflect upon the reputation of private persons. And the same exemption belongs to judges and judicial officers of all kinds when acting within the limits of their jurisdiction.

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Same—Participants in Judicial Proceedings.

All statements legitimately made in the course of judicial proceedings are privileged. This privilege extends alike to parties, counsel, witnesses, jurors, and judges; and it does not in any respect depend upon the bona fides of the person. The occasion on which such a communication is made is absolutely privileged, and the only questions are whether the occasion existed, and whether the matter complained of was pertinent to the occasion.[59] For instance, statements made in affidavits, or orally, as a basis for an inquiry into an alleged crime, or for the purpose of setting in motion the machinery of the criminal law, are within this privilege. "Every one having reasonable and probable grounds for believing that a crime has been committed has the right to communicate his belief to the magistrate having jurisdiction of the offense." And consequently statements which are false in fact, and would be otherwise actionable, are privileged if made in an affidavit or other paper addressed to a magistrate, for the purpose of causing a warrant of arrest or a search warrant to issue, or to a grand jury for the purpose of procuring an indictment.[60] For, said the judges in an early case, if such statements would maintain an action, "no other would come to a justice to make complaint and to inform him of any felony."[61] If, therefore, such a communication is "apparently pertinent, it is absolutely exempt from the legal imputation of slander; and the party injured is turned round to a different remedy, an action for malicious prosecution, wherein he is bound to prove in the first instance, not merely that the communication was made in bad faith, but that it was not countenanced by probable cause."[62] The same principle applies to documents properly and pertinently filed in a judicial proceeding after its inauguration. No action will lie for defamatory statements made or sworn in the course of a cause before a court of competent jurisdiction. All documents necessary to the conduct of the cause,

[59] Gardemal v. McWilliams, 43 La. Ann. 454, 9 South. 106.

[60] Townsh. Sland. & L. § 220; Vogel v. Gruaz, 110 U. S. 311, 4 Sup. Ct. 12; Lister v. Perryman, L. R. 4 H. L. 521; Randall v. Hamilton, 45 La. Ann. 1184, 14 South. 73; Eames v. Whittaker, 123 Mass. 342; Ball v. Rawles, 93 Cal. 222, 28 Pac. 937; Warden v. Whalen, 8 Pa. Co. Ct. R. 660.

[61] Ram v. Lamley, Hut. 113.

[62] Howard v. Thompson, 21 Wend. (N. Y.) 319, 325.

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such as pleadings, affidavits, and instructions to counsel, are privileged.[63] But still this privilege cannot be abused. If it appears that a statement made in an affidavit in a judicial proceeding was defamatory, wholly gratuitous and irrelevant, known to be false, and published with malice and without cause or justification, it will support an action.[64]

The judge presiding at a trial is of course entirely exempt from responsibility for what he may say in regard to the case, the parties, or the evidence; and the same is true of the jurors in their discussion of the case and their deliberations while making up the verdict. Neither will any action of slander lie against a witness for evidence given by him in a judicial proceeding, pertinent and material to the cause, and in response to questions put to him by court or counsel, even though such evidence was false and maliciously designed to injure another.[65] But if the witness takes advantage of his position to gratify his personal spite, and goes out of his way to cast injurious reflections upon the character or conduct of another, speaking falsely and maliciously with regard to a matter that has no relation or reference to the subject of investigation, he is not protected from the consequences of his tortious act.[66] "A witness in the box," says Odgers, "is absolutely privileged in answering all the questions asked him by counsel on either side; and even if he volunteers an observation, still if it has reference to the matter in issue, or fairly arises out of any question asked him by counsel, such observation will also be privileged. But a remark made by a witness in the box, wholly irrelevant to the matter of inquiry, uncalled for by any question of counsel, and introduced by the witness maliciously for his own purposes, would not be privileged."[67] Another and very important case of absolute privilege is that of a lawyer addressing the court or jury on his client's case. He is not to be held accountable for his com-

[63] Odgers, Sland. & L. 187; Henderson v. Broomhead, 4 Hurl. & N. 569.

[64] Sherwood v. Powell, 61 Minn. 479, 63 N. W. 1103.

[65] Seaman v. Netherclift, 2 C. P. Div. 53; Allen v. Crofoot, 2 Wend. (N. Y.) 515; Calkins v. Sumner, 13 Wis. 193; Crecelius v. Bierman, 59 Mo. App. 513; Baldwin v. Hutchison, 8 Ind. App. 454, 35 N. E. 711; McLaughlin v. Charles, 60 Hun, 239, 14 N. Y. Supp. 608; Etchison v. Pergerson, 88 Ga. 620, 15 S. E. 680.

[66] Hunckel v. Voneiff, 69 Md. 179, 14 Atl. 500, per Robinson, J., dissenting.

[67] Odgers, Sland. & L. 191.

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ments upon the evidence, the witnesses, or the opposing party, nor can they be made the basis of an action against him. Thus, though an attorney, on the trial of his client on a criminal charge, in commenting upon the testimony of a witness who has given evidence tending to sustain the charge, may, during his argument, accuse such witness of perjury, in regard to matters to which he has testified pertinent to the inquiry in hand, he is not liable to an action of slander.[68]

Conditional Privilege—Reports of Judicial Proceedings.

It is always permissible to publish the proceedings of the courts, if it is done impartially and truthfully, and without intent to reflect injuriously upon the character of any party concerned. "The publication, without malice, of an accurate report of what has been said or done in a judicial proceeding in a court of justice, is a privileged publication, although what was said or done would, but for the privilege, be libelous against an individual and actionable at his suit; and this is true although what is published purports to be, and is, a report not of the whole judicial proceeding, but only of a separate part of it, if the report of that part is an accurate report thereof and published without malice."[69] "The publication of a fair and true report of any judicial proceeding without malice is privileged. This was substantially the rule at common law, and was founded on the principle that the advantage to the community from publicity of proceedings in courts of justice was deemed so great that the occasional inconvenience resulting from it to individuals should yield to the public good. The publication of such proceedings is treated as made without reference to the individuals concerned, and solely for the information and benefit of society, until the contrary appears; and therefore the presumption of malice does not arise and such publication is privileged."[70] But the privilege extends only to an actual record of the proceedings. Comments upon the case or upon the evidence, remarks upon the character or history of the parties concerned, descriptive headings, observations and innuendoes are not

[68] Jennings v. Paine, 4 Wis. 358.

[69] Macdougall v. Knight, 25 Q. B. Div. 1.

[70] Salisbury v. Advertiser Co., 45 Hun, 120. And see Johns v. Publishing Co. (Super. N. Y.) 19 N. Y. Supp. 3; Hawkins v. Printing Co., 10 Mo. App. 174.

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privileged; if unfair, false, or defamatory, they are libelous, and may be punished as such.[71] Neither does the privilege extend to the reporting of such proceedings as are merely preliminary or ex parte. "If the publisher of a newspaper," says the supreme court of Ohio, "may, in virtue of his vocation, without responsibility, publish the details of every criminal charge made before a police officer, however groundless, and whether emanating from the mistake or the malice of a third person, then must private character be indeed imperfectly protected. Such publications not only inflict an injury of the same kind with any other species of defamation, but their tendency is also to interfere with the fair and impartial administration of justice, by poisoning the public mind and creating a prejudice against a party whom the law still presumes to be innocent." [72] The proceedings before a grand jury are not proceedings before a judicial body, in the sense that the publication of such proceedings is privileged.[73] But one is not punishable for publishing a report of a legislative committee, although it reflects upon the character of an individual.[74]

Same—Criticism of Public Officers.

In the class of conditionally privileged communications are included criticisms upon the official character or conduct of a public officer. Such criticisms are not actionable if made with an honest design to enlighten the public and for their interest and benefit, but they are punishable if made with a malicious design to injure or degrade the individual. "The official act of a public functionary," says the court in New York, "may be freely criticised, and entire freedom of expression used in argument, sarcasm, and ridicule upon the act itself, and then the occasion will excuse everything but actual malice and evil purpose in the critic." But "the occasion will not of itself excuse an aspersive attack upon the character or motives of the officer; and to be excused, the critic must show the truth of what he has uttered of that kind." [75] A publication, therefore, which would be a libel on a private person may not be a libel on a

[71] Thompson v. Powning, 15 Nev. 195.
[72] Cincinnati Gazette Co. v. Timberlake, 10 Ohio St. 548.
[73] McCabe v. Cauldwell, 18 Abb. Prac. (N. Y.) 377.
[74] Rex v. Wright, 8 Term R. 293.
[75] Hamilton v. Eno, 81 N. Y. 116.

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person acting in a public capacity; but any imputation of unjust or corrupt motives is equally libelous in either case.[76] Thus, it is a libel to charge a member of the legislature with acting corruptly in his official capacity, or with being induced by some pecuniary or valuable consideration to act in a particular manner upon matters coming before him as a legislator.[77] So, a charge that a financial statement of a county by the county auditor was false, and that an officer who would swear to one lie would swear to another, is a libel.[78] Further, in applying the rule of fair and reasonable comment upon the public conduct of an officer, the courts will not be illiberal in measuring the degree of warmth and vigor which the writer may infuse into his language. But when such criticism turns into gibes, taunts, or sneers, or personal insult or derision, directed against his physical peculiarities, his idiosyncrasies of manner, or his name, calculated to bring him into ridicule and contempt, the limits of privilege are overstepped and the article becomes a libel.[79] And again, false and defamatory words in regard to a public officer, spoken or published of him as an individual, are not privileged on the ground that they related to a matter of public interest, and were spoken or published in good faith.[80]

Same—Criticism of Candidates for Office.

A similar rule obtains in regard to criticisms upon the character, history, or fitness of a candidate for public office, elective or appointive. "The fitness and qualification of a candidate for an elective office may be a subject for the freest scrutiny and investigation, either by the proprietor of a newspaper or by a voter or other person having an interest in the matter, and much latitude must be allowed in the publication, for the information of voters, of charges affecting the fitness of a candidate for the place he seeks, so long as it is done honestly and without malice. Nor will such publication be actionable without proof of express malice, although it may be harsh, unjust, and unnecessarily severe, for these are mat-

[76] Parmiter v. Coupland, 6 Mees. & W. 105.

[77] Wilson v. Noonan, 23 Wis. 105; State v. Schmitt, 49 N. J. Law, 579, 9 Atl. 774.

[78] Prosser v. Callis, 117 Ind. 105, 19 N. E. 735.

[79] Buckstaff v. Viall, 84 Wis. 129, 54 N. W. 111.

[80] Post Pub. Co. v. Moloney, 50 Ohio St. 71, 33 N. E. 921.

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ters of opinion of which the party making the publication has a right to judge for himself. In the case of such a publication, the occasion rebuts the inference of malice which the law would otherwise raise from its falsity, and no right of action exists, even though the character of the party has suffered, unless he is able to show the existence of actual malice. But when the publication attacks the private character of a candidate by falsely imputing to him a crime, it is not privileged by the occasion, either absolutely or qualifiedly, but is actionable per se, the law implying malice; and it is no justification that the publication was made with an honest belief in its truth, in good faith, and for the purpose of influencing voters. Such publications can only be justified by proof of their truth." [81] The mental qualifications of a candidate for public office, no less than his character and his fitness in other respects, are open to fair discussion, and it is not libelous to argue that he has not sufficient education or intelligence to discharge the duties of the office in a proper manner, provided the writer's arguments are fair and based on fact. But it is not permissible falsely to charge him with having spoken or written words which, if actually uttered by him, would show him to be utterly illiterate and stupid.[82]

Same—Criticism of Courts and Judges.

It is the right of the citizen to comment upon the decisions and actions of the courts of justice, and to discuss their correctness, the fitness or unfitness of the judges for their stations, and the fidelity with which they perform their duties; but he has no right to attempt, by defamatory publications, to degrade the tribunal, destroy public confidence in it, and dispose the community to disregard its orders and decrees. Such publications are an abuse of the liberty of the press, and are punishable.[83] Thus, to say of a judge that he will allow his political predilections to influence his judicial action in favor of his fellow partisans, is libelous, and not privileged.[84] So, also, an article charging a judge with maintaining a secret partnership in the business of the law with his son, the latter being a

[81] Upton v. Hume, 24 Or. 420, 33 Pac. 810. And see Wheaton v. Beecher, 66 Mich. 307, 33 N. W. 503; Hallam v. Publishing Co., 55 Fed. 456.

[82] Belknap v. Ball, 83 Mich. 583, 47 N. W. 674.

[83] State v. Morrill, 16 Ark. 384.

[84] In re Moore, 63 N. C. 397.

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member of the bar in active practice, with the inference that the judge receives fees from parties to cases coming before him in his court, amounts to a charge of misconduct in office, and is libelous if not true.[85] And, again, an article imputing to a judge engaged in the trial of a cause such conduct in respect to the case upon trial as, if true, would render him an unfit person to preside at the trial, is libelous and a contempt of court.[86]

Same—Criticism of Literary Compositions.

Criticisms of books and other literature offered to the public are privileged provided they are honest and fair, made in good faith, and not used as a cloak to cover an injurious personal attack upon the writer. It is not libelous to ridicule a literary composition, or the author of it, in so far as he has embodied himself in his work; and if he is not followed into domestic life for the purpose of personal slander, he cannot maintain an action for any damage he may suffer in consequence of thus being rendered ridiculous.[87] To say of a published pamphlet, dealing with a public question, that it is "the effusion of a crank," is not necessarily libelous. To make it so, it must be shown that the word "crank" carries a defamatory meaning, and that the plaintiff has been specially damaged.[88]

Jury as Judges of the Law.

In the constitutions of many of the states, it is provided that, in prosecutions for libel, the jury shall be judges of the law. This provision is in furtherance of the right of free speech, or was intended to be so. For it is historically due to the early disposition of the English courts (before alluded to, and particularly with reference to Lord Mansfield) to limit the province of the jury to the single fact of publication, reserving to the court the right to determine whether or not the publication in question was libelous. Such a constitutional provision makes the latter question, no less than the former, a subject for the sole decision of the jury.

[85] Royce v. Maloney, 58 Vt. 437, 5 Atl. 395.
[86] Myers v. State, 46 Ohio St. 473, 22 N. E. 43.
[87] Carr v. Hood, 1 Camp. 354, note.
[88] Walker v. Tribune Co., 29 Fed. 827.

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THE RIGHT OF ASSEMBLY AND PETITION.

243. The first amendment to the federal constitution provides that "congress shall make no law abridging the right of the people peaceably to assemble and to petition the government for a redress of grievances."

This clause was probably suggested by the fifth declaration of the English Bill of Rights, passed in the first year of William and Mary, after the revolution of 1688, wherein the right of the subject to petition the king is set forth. But the right secured is so essential to a free government that it would probably be regarded as inherent in the nature of our republican systems, even if it were not expressly placed under the protection of the constitution. The prohibition, however, is here laid only upon congress. It is intended as a protection against federal action alone. But the right of the people peaceably to assemble for the purpose of petitioning congress for a redress of grievances, or for anything else connected with the powers or duties of the national government, is an attribute of national citizenship, and as such under the protection of and guaranteed by the United States. The very idea of a government republican in form implies that right, and an invasion of it presents a case within the sovereignty of the United States.[89]

It will be noticed that two separate, though related, rights are here secured. It is not that the right to assemble for the purpose of framing or presenting petitions is guarantied. But the people have the right to assemble for lawful purposes, though no petition is included within the scope of those purposes. But since assemblages for commercial, social, religious, or commemorative purposes are sufficiently cared for in other provisions of the various constitutions, the importance of the clause under consideration will principally be apparent in connection with political meetings. And here the right of assembly will include not only the meetings and conventions familiar in our political methods, but also the assemblage of those who have no standing as voters, when held with a view to secure political recognition or urge the repeal of oppressive laws.

[89] U. S. v. Cruikshank, 92 U. S. 542.

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But the right of assembly and petition is not absolutely unrestricted. It must be exercised "peaceably." By this is meant that assemblies must be for lawful purposes and must not be tumultuous or riotous in their character, and that petitions must not be of a seditious nature, nor accompanied by any parade of force or show of intimidation or threats.[90] If these conditions are violated, the participants become amenable to the criminal laws, and cannot complain that their lawful rights are abridged. This principle may be illustrated by certain facts from English constitutional history which preceded the adoption of our own constitution. It is a maxim of the law of England that the subject has a right to prefer petitions for the redress of grievances. This right was fully and triumphantly vindicated upon the trial and acquittal of the seven bishops, in the fourth year of James II., and the result of that trial has always been regarded as one of the most notable victories of the law against attempts at tyrannical oppression of the people.[91] Yet at that very time there was on the statute book an act against "tumultuous petitioning," wherein it was provided that not more than twenty names should be signed to any petition to the king or either house of parliament for any alteration of matters established by law in church or state, unless the contents thereof were previously approved, in the country, by three justices or the majority of the grand jury at the assizes or quarter sessions, and in London, by the lord mayor, aldermen, and common council, and that no petition should be delivered by a company of more than ten persons.[92] Afterwards came the Bill of Rights, wherein it was declared "that it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal." But the statute referred to was not repealed by this declaration, and it is still in force in England, though probably entirely a dead letter. The distinction which it introduced, between lawful and peaceable petitioning and such proceedings as are riotous or tumultuous, has become a recognized part of the English law, though the specific provisions of the statute are no longer regarded. This was made apparent upon the trial of Lord

[90] See Com. v. Abrahams, 156 Mass. 57, 30 N. E. 79.

[91] Case of The Seven Bishops, 12 How. St. Tr. 183, Broom, Const. Law, 406.

[92] Stat. 13 Car. II. St. 1, c. 5.

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George Gordon for high treason, in 1781. The followers of this nobleman, in immense numbers, presenting the petition of the Protestant Association, had besieged parliament in its very house with threats, violence, and rioting. On this trial, Lord Mansfield charged the grand jury that "to petition for the passing or repeal of any act is the undoubted inherent birthright of every British subject, but under the name and color of petitioning to assume command, and to dictate to the legislature, is the annihilation of all order and government. Fatal experience had shown the mischief of tumultuous petitioning, in the course of that contest, in the reign of Charles I., which ended in the overthrow of the monarchy, and the destruction of the constitution; and one of the first laws after the restoration of legal government was a statute passed in the 13th year of Charles II., enacting that no petition to the king or either house of parliament for alteration of matters established by law in church or state, shall be signed by more than twenty names or delivered by more than ten persons. In opposition to this law, the petition in question was signed and delivered by many thousands, and in defiance of principles more ancient and more important than any regulations upon the subject of petitioning. The desire of that petition was to be effected by the terror of the multitude that accompanied it through the streets, classed, arranged, and distinguished as directed by the advertisements." [93]

The meaning of this clause in the first amendment to the federal constitution was brought into prominent light, and its effect earnestly debated, in 1836 and 1837, when the house of representatives adopted a resolution that all petitions relating in any manner to the subject of slavery or the question of its abolition should be laid on the table, without being either printed or referred, and that no further action whatever should be had upon them. But no important rule or principle was established, and the resolution itself, with the debates which accompanied it, are now of historical interest only.[94]

The right of petition would be of but little value if the persons exercising it were afterwards liable to be punished for their use of the privilege. "I take it to be undeniable," says a learned judge, "that

[93] Proceedings against Lord George Gordon, 21 How. St. Tr. 487.

[94] See 2 Von Holst, Const. Hist. U. S. pp. 245–262.

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the right of petition, as that expression is used in the constitution of the state, means the right of every being, natural and artificial, to apply to any department of government, including the legislature, for the redress of grievances or the bestowal of right, and is a further guaranty of the enjoyment of such redress or right when obtained, free from all forfeiture or penalty for having sought or obtained it."[95] And it is a well-settled principle of law that petitions and memorials are privileged (so that the authors or signers of them are exempt from all liability, under the law of libel, for the statements made in them) if they are made in good faith and for a proper purpose, by a party having an interest in the matter to a party having an interest or a power to act.[96] Thus, for example, a letter or petition addressed to the President, the governor of a state, or any public officer having the power to act in the matter, complaining of misconduct in an inferior officer, or containing accusations against him, and demanding his removal from office, is not a libel if it was written as a bona fide complaint, to obtain redress for a grievance which the party really believed he had suffered. Such petitions are so far of the nature of judicial proceedings that the accuser is not held to prove the truth of them, nor is he responsible for the injury they may do to the person accused, unless they were founded in malice and made wantonly and without probable cause.[97] A communication intended to be made to the proper authority, respecting matters affecting the honesty of a public employé, is privileged, if made in good faith and without any personal malicious motive, although in fact it is addressed and delivered to the wrong person.[98]

[95] Citizens' Bank of Louisiana v. Board of Assessors of Orleans, 54 Fed. 73.

[96] Harrison v. Bush, 5 El. & Bl. 344; Wright v. Lothrop, 149 Mass. 385, 21 N. E. 963; Odgers, Sland. & L. 220.

[97] Woodward v. Lander, 6 Car. & P. 548; Gray v. Pentland, 2 Serg. & R. (Pa.) 23; Kent v. Bongartz, 15 R. I. 72, 22 Atl. 1028.

[98] Scarll v. Dixon, 4 Fost. & F. 250.

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DISFRANCHISEMENT.

244. In the United States, disfranchisement exists only as a punishment for crime or as a consequence of conviction thereof. It may include—

(a) Loss of the right of suffrage.

(b) Disqualification to be a witness in judicial proceedings.

(c) Disqualification to hold public office.

Meaning of Disfranchisement.

Disfranchisement is defined as the act of depriving a person of franchises formerly held by him. In public law, it is applied especially to the taking away from an individual of his political rights and privileges, or of his rights as a free citizen. In a still narrower sense, it means the disqualification of an individual to exercise the elective franchise.

In old English law, a person who was outlawed, excommunicated, or convicted of an infamous crime, was said to "lose his law" (legem amittere), which included the loss of his civil rights or the benefit and protection of the law, and in a more restricted sense, the deprivation of the right to give his evidence as a witness in a court of law. On the other hand, a man who stood "rectus in curia," that is, possessed of all his civil rights, and not outlawed, excommunicated, or infamous, was called "legalis homo," or a "good and lawful man." Something similar to this was found in the Roman law, where the lesser or medium loss of status (capitis diminutio media) occurred when a man lost his rights of citizenship, and his family rights, but without losing his liberty.

In the United States, the deprivation of civil rights can be inflicted by the government only as a punishment for crime, or it may be decreed to follow as a consequence of the infamy supposed to characterize one convicted of crime. Citizenship, as such, can never be forfeited save by the voluntary renunciation of the party. That is to say, there is no constitutional way in which the United States or a state could reduce a person, enjoying the character of a citizen, to the standing of an alien. But several of the privileges attached to the status of citizenship may be stripped off, by way of punishment

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for an offense duly proven in the courts. This power, however, cannot be exercised in any arbitrary manner, nor by laws framed against particular individuals or classes of citizens. An act inflicting such disqualifications, if aimed at a particular person or class, and having relation to past acts only, would amount to a bill of attainder or an ex post facto law, or partake of the character of both.[99]

Discriminations as to Offices.

Although the power to discriminate against individuals or classes, in the distribution of civic rights or the infliction of civil disqualifications, is denied to the states by provisions found both in their own constitutions and in the last three amendments to the constitution of the United States, yet, in prescribing the qualifications for office, or distributing the patronage of the state, it is not incompetent for the legislature to make reasonable and proper discriminations. No one, for instance, could successfully question the validity of the civil service laws which make the passing of an examination a pre-requisite to the right to be appointed to office. So, also, it is held that statutes providing that honorably discharged soldiers and sailors of the late civil war shall be preferred for appointments to positions in the civil service of the state and of its cities, over other persons of equal standing, are not unconstitutional.[100] And in New York it has been adjudged that a law declaring that not more than two of the three persons constituting the civil service commission thereby established shall be adherents of the same political party, is not in conflict with the constitutional provision that "no member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers." [101]

Right of Suffrage.

In most of the states, as already remarked, many persons who are entitled to be denominated citizens are not allowed the privilege of the ballot. Such are women, minors, insane persons, the illiterate, and in some states the proletarian classes. But the denial of the

[99] Cummings v. Missouri, 4 Wall. 277; Ex parte Garland, Id. 333.

[100] In re Wortman (Sup.) 2 N. Y. Supp. 324; Sullivan v. Gilroy, 55 Hun, 285, 8 N. Y. Supp. 401.

[101] Rogers v. City of Buffalo, 123 N. Y. 173, 25 N. E. 274. But compare City of Evansville v. State, 118 Ind. 426, 21 N. E. 267.

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right of suffrage to these persons cannot properly be called a disfranchisement of them, because that term is correctly applied only to the deprivation of a privilege heretofore enjoyed. But disfranchisement, in the sense of a taking away of the elective franchise from persons who formerly possessed it, exists in most of the states as a punishment for crime. Several of the state constitutions contain provisions denying the right of voting at public elections to those who shall be convicted of an "infamous crime," or of "high crimes," or of "felony." And in some of the constitutions, various crimes are specified, a conviction of which shall work the deprivation of this right, such as treason, bribery, duelling, betting on elections, perjury, embezzlement of public money, larceny, and forgery.[102]

Disqualification to be a Witness.

By the English common law, a person who was convicted of an infamous crime was thereby rendered incompetent as a witness, on the theory that a person who would commit so heinous a crime must necessarily be so depraved as to be unworthy of credit. These crimes were treason, felony, and the crimen falsi. But at present, the disqualification of infamy has been done away with by statute in England and in most of the United States, and the rule has been substituted that a conviction for crime may be adduced in evidence to affect the credibility of the witness.[103]

Ineligibility to Office.

If a convict is considered unworthy to exercise the elective franchise, much more should he be deemed unfit to hold office in the government. Accordingly, we find that the constitutions of many of the states declare that no person who has been convicted of certain crimes shall be eligible to hold public office.[104] These provisions vary greatly in respect to the specific crimes which are to be attended with this consequence. But those most frequently enumerated are trea-

[102] Stim. Am. St. Law, pp. 62, 63.

[103] 1 Whart. Ev. § 397.

[104] While the legislature cannot establish arbitrary exclusions from office, nor any general regulations requiring qualifications which the state constitution has not required, yet a law declaring that no person guilty of certain enumerated criminal offenses shall be eligible to any office of profit, trust, or emolument under the state government, is valid. Barker v. People, 8 Cow. (N. Y.) 686.

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son, bribery, duelling, malfeasance in office, public defalcation or embezzlement of the public funds, perjury, offenses against the election laws, and murder. In a number of the states, the disqualification attaches to the conviction of any infamous crime. This consequence of a conviction is strictly and properly a punishment. It cannot be inflicted except by due process of law. Thus, a constitutional provision making a defaulter or embezzler of the public money ineligible to any office of trust or profit presupposes that the default shall be ascertained and fixed by judicial or other legal authority; until this is done, the acts of a person holding the office will be valid and binding, and his sureties will be liable for them.[105] But a person who has committed an act disqualifying him for office may be removed from his office by a proceeding by quo warranto, or by information in the nature of a quo warranto, although he has not been convicted of the offense in any criminal prosecution against him.[106]

The federal constitution also contains certain provisions of this character. Thus, in article 1, § 3, we read: "Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States." And the third section of the fourteenth amendment provides that no person shall hold any office, civil or military, under the United States or under any state, who, having previously taken an oath, as a member of congress or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress, by a two-thirds vote of each house, may remove such disability. Congress has been very liberal in the exercise of the power to remove this disability, and it is believed that there are now very few persons, if any, who still remain under its burden.

[105] Cawley v. People, 95 Ill. 249.

[106] Royall v. Thomas, 28 Grat. (Va.) 130; Com. v. Walter, 88 Pa. St. 105; Brady v. Howe, 50 Miss. 607.

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CHAPTER XX.

CONSTITUTIONAL GUARANTIES IN CRIMINAL CASES.

245–246. Provisions in the Constitutions.
247. Presentment or Indictment.
248–249. Trial by Jury.
250. Privilege against Self-Criminating Evidence.
251. Confronting with Witnesses.
252. Compelling Attendance of Witnesses.
253. Right to be Present at Trial.
254. Assistance of Counsel.
255. Right to be Heard.
256. Speedy and Public Trial.
257–259. Twice in Jeopardy.
260. Bail.
261. Cruel and Unusual Punishments.
262. Bills of Attainder.
263. Ex Post Facto Laws.
264. Suspension of Habeas Corpus.
265–267. Definition of Treason.
268. Corruption of Blood and Forfeiture.

PROVISIONS IN THE CONSTITUTIONS.

245. Under the American systems, every person charged with crime and brought to trial therefor is secured, by constitutional guaranties, in the enjoyment of certain rights which are generally deemed essential to the due administration of justice under a free government. Some of these rights are secured by the constitution of the United States, others by the constitutions of the individual states, and others by both concurrently.

246. The most important of these rights are as follows:

(a) The right to a presentment or indictment by a grand jury.

(b) The right to be tried by a petit jury.

(c) The exemption of the prisoner from being compelled to testify against himself.

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(d) The right to be confronted with the witnesses against him.

(e) The right to compulsory process for obtaining witnesses in his favor.

(f) The right to be present at the trial.

(g) The right to be heard in person or by attorney and to have the assistance of counsel for his defense.

(h) The right to a speedy, fair, and public trial.

(i) The privilege against being deprived of life, liberty, or property without due process of law.

(j) The guaranty that the prisoner shall not be twice put in jeopardy of life or limb for the same offense.

(k) The guaranty that excessive bail shall not be required.

(l) The guaranty that excessive fines shall not be imposed nor cruel and unusual punishments inflicted.

(m) The provision that no person shall be punished by a bill of attainder or an ex post facto law.

(n) The privilege of the writ of habeas corpus, except when it may be lawfully suspended in emergencies provided for by the constitution.

The fifth, sixth, and eighth amendments to the federal constitution, wherein many of the above mentioned rights are guarantied to persons accused of crime, are now conceded to be applicable only to the courts of the United States and proceedings therein. They were not intended to operate, and do not operate, to restrict the power of a state in its dealings with persons offending against its own laws, but were designed merely as limitations upon the power of the national government.[1] But the same rights are secured by

[1] Miller v. State, 158 U. S. 535, 14 Sup. Ct. 874; Twitchell v. Com., 7 Wall.

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the constitutions of nearly all the states, not always in the same language, but to practically the same effect. And there are certain provisions of the federal constitution, relating to criminal procedure, which are binding, not upon the national government and its courts, but primarily upon the several states and their judges and legislatures. These are the provisions that no state shall pass any bill of attainder or ex post facto law, and that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Waiver of Rights.

Some of these rights are merely personal to the defendant and may be waived by him. Others, according to the prevalent doctrine, are inalienable and cannot be taken away even with the free consent of the accused. Thus, he cannot be compelled to furnish evidence against himself; but a statute allowing him to testify at his own trial if he elects to do so is constitutional, and if he takes the stand in his own behalf, he may then be cross-examined the same as any other witness.[2] So, he has the right to be confronted with the witnesses against him. But a law providing that he may take depositions of witnesses in a foreign jurisdiction on condition that he consents to the prosecution doing the same, is constitutional, and if he takes advantage of this act, he thereby waives his guarantied rights to that extent.[3] On the other hand, it is held (in a majority of the states, though not in all) that the right to be tried by a jury of his peers is an inalienable right, which the accused cannot give up, unless, it may be, by express statutory authority, or in cases of mere misdemeanors.[4] Again, it is generally held that the prisoner cannot waive his right to be present at the trial. If he is absent, there is a want of jurisdiction, and the court cannot proceed with the trial, nor receive a verdict, nor pronounce sentence.[5] But

321; State v. Paul, 5 R. I. 185; Murphy v. People, 2 Cow. (N. Y.) 815; Pervear v. Com., 5 Wall. 475; O'Neil v. Vermont, 144 U. S. 323, 12 Sup. Ct. 693.

[2] People v. Tice, 131 N. Y. 651, 30 N. E. 494; Boyle v. State, 105 Ind. 469, 5 N. E. 203.

[3] Butler v. State, 97 Ind. 378.

[4] Wilson v. State, 16 Ark. 601; State v. Maine, 27 Conn. 281; Whallon v. Bancroft, 4 Minn. 109 (Gil. 70). Compare League v. State, 36 Md. 259.

[5] People v. Perkins, 1 Wend. (N. Y.) 91; Prine v. Com., 18 Pa. St. 103; State

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this rule is not applicable to the trial of a misdemeanor or a breach of a municipal ordinance; such a trial may proceed in the absence of the accused, if he was legally arrested.[6]

PRESENTMENT OR INDICTMENT.

247. The fifth amendment to the constitution of the United States provides that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger." And the same provision is to be found in the constitutions of most of the states, except that, in some, it is extended to all criminal offenses, and that, in some others, it is provided that no person, for any indictable offense, shall be proceeded against criminally by information.

The object of this guaranty is to secure to persons charged with high crimes the intervention of a grand jury, which safeguard against tyranny and oppression is generally regarded as no less important than the right to a trial by jury after indictment found. A presentment, properly speaking, is an accusation made ex mero motu, by a grand jury, of an offense, upon their own observation and knowledge, or upon evidence before them, without any bill of indictment laid before them at the suit of the government. An indictment is a written accusation of an offense preferred to a grand jury and presented upon oath by them as true, at the suit of the government. Upon a presentment, the proper officer of the

v. Hughes, 2 Ala. 102. Compare Fight v. State, 7 Ohio, pt. 1, p. 180; McCorkle v. State, 14 Ind. 39.

[6] City of Bloomington v. Heiland, 67 Ill. 278.

[7] At the common law, a grand jury was composed of not less than twelve nor more than twenty-three persons, and the concurrence of twelve of this number was absolutely essential to the finding of an indictment. A state statute which provides that every grand jury shall consist of twelve persons is not unconstitutional. But if it goes further than this, and provides that the assent of eight of that number shall be sufficient to the finding of an indictment, it is invalid. English v. State, 31 Fla. 340, 12 South. 689.

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court must frame an indictment before the party accused can be put to answer it. But an indictment is usually, in the first instance, framed by the officers of the government and laid before the grand jury.[8] An information is an accusation in the nature of an indictment, but differs from it in that it is presented by a competent public officer on his own oath of office, instead of by a grand jury on their oath.[9] The constitutional provision in question is therefore designed to interpose a barrier against vindictive or tyrannical prosecutions either by the government or by political partisans or private enemies. Such a provision is jurisdictional. And where it is found, no court has authority to try a prisoner without indictment or presentment for such a crime as is covered by it.[10] It is scarcely necessary to add that the right to a presentment or indictment was not created by the American constitutions. The grand jury was an established institution of English law long before the Norman conquest.

What is an "infamous crime"? This question has been much debated, and opinions differ as to just what is included in this term. But the courts of the United States have determined that any crime which is punishable by imprisonment in a state prison or penitentiary, with or without hard labor, is an infamous crime within the meaning of the fifth amendment.[11] But as regards mere misdemeanors, which involve neither infamy in the offender nor in the punishment, it is agreed that congress or a state legislature has the power to provide that they shall be proceeded against either by indictment or by information.[12]

The cases excepted from the provision are such as arise in the army or navy, or in the militia when in service or organized on a war footing. By the Articles of War, courts-martial have jurisdiction to punish larceny when committed by persons in the military service to the prejudice of good order and military discipline; and it was not intended that proceedings thereon should be in the

[8] 2 Story, Const. § 1784.

[9] 1 Bish. Cr. Proc. § 141.

[10] Ex parte Bain, 121 U. S. 1, 7 Sup. Ct. 781.

[11] Ex parte Wilson, 114 U. S. 417, 5 Sup. Ct. 935; Mackin v. U. S., 117 U. S. 348, 6 Sup. Ct. 777; U. S. v. De Walt, 128 U. S. 393, 9 Sup. Ct. 111.

[12] State v. Ebert, 40 Mo. 186; King v. State, 17 Fla. 183.

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technical form of criminal proceedings founded on indictments.[13] Furthermore, there are certain kinds of proceedings which resemble criminal proceedings in their form, or in the nature of the judgment to be pronounced, but yet are not trials for "criminal offenses," and therefore not within this constitutional guaranty. Thus, an information in the nature of a quo warranto, brought to try the right to an office or franchise, though in form a criminal proceeding, is in the nature of a civil remedy, and hence is not within the constitutional requirement of presentment or indictment.[14]

The provision in the sixth amendment, and the constitutional provisions in many of the states, that persons charged with crime shall have the right to hear the nature and cause of the accusation against them, or that the indictment shall "fully and plainly, substantially and formally, describe the offense with which the prisoner is charged," are peremptory and cannot be violated, though they do not change the rules of the common law.[15] But such a provision does not prohibit the simplification of criminal pleadings by the abolition of verbiage and the technical forms of the ancient law. The legislature may prescribe a form of indictment to be used in the courts of the state, simplifying the formulas of the common law or omitting unnecessary prolixities, provided only that an indictment modeled on such statutory form must contain all the allegations needed to give it legal certainty and to charge an offense.[16] An indictment for murder must allege both the time and the place of the death of the victim, and if it omits either of these it is fatally defective.[17]

[13] In re Esmond, 5 Mackey (D. C.) 64.

[14] State v. Hardie, 1 Ired. (N. C.) 42; Bank of Vincennes v. State, 1 Blackf. (Ind.) 267.

[15] Com. v. Davis, 11 Pick. (Mass.) 438; Murphy v. State, 28 Miss. 637. A statute providing that every person who steals property in another state or country, and brings the same into the enacting state, may be punished "as if the larceny had been committed" in that state, is inconsistent with this constitutional provision, because the courts of the state cannot assume that the crime of "larceny" or "stealing" exists in another state or country. Territory v. Hefley (Ariz.) 33 Pac. 618.

[16] Dillon v. State, 9 Ind. 408; State v. Comstock, 27 Vt. 553; State v. Schnelle, 24 W. Va. 767.

[17] Ball v. U. S., 140 U. S. 118, 11 Sup. Ct. 761.

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TRIAL BY JURY.

248 The right of trial by jury, guarantied to all persons charged with crime, includes the right to be tried by a jury of twelve men, drawn from the vicinage, who shall be impartially selected and not objectionable on account of any disqualifying causes, and who must unanimously agree upon a verdict of guilty before the prisoner can be sentenced and punished.

249. This privilege may be claimed, as a matter of constitutional right, in all prosecutions for indictable offenses or for such crimes as were triable by jury at common law. And where it is provided (as it is in many of the state constitutions) that the right of trial by jury shall "be preserved," or shall "remain inviolate," it is meant that this right shall continue as it existed at the adoption of the constitution. And the guaranty of the right of trial by jury prohibits the legislature and the courts from imposing such restrictions or impediments upon it as would unreasonably impair it.

The right of a person charged with crime to be tried by a "jury of his peers" is not a right created by the constitutions. It is a common law right of great antiquity, and was expressly recognized and secured by Magna Charta. All that the constitutions do is to reaffirm it and place its continuance beyond the hazard of ephemeral changes of public opinion. But even if this right were not mentioned in our constitutions, the abolition of it would be universally regarded as a revolutionary measure. Whether the trial by jury (and particularly the requirement of unanimity) is a help or a hindrance to the effective administration of criminal justice, is a question much debated by publicists, of late years, but one with which we are not at present concerned.

Trial by jury always means a trial by a jury of twelve men, in accordance with the ancient common law composition of the petit jury. Unless the constitution expressly permits it, there is no power in the legislature to require or authorize a trial for an indictable offense

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by a jury of less or more than twelve members.[18] The jury must be impartial. And to secure this, the prisoner must have the right to challenge or object to such jurors as are disqualified for any cause. The legislature may prescribe the time and manner of determining the objections to the qualifications of jurors, but it cannot take away the right of objecting.[19] But laws limiting the number of peremptory challenges to be allowed to the defendant, or granting peremptory challenges to the prosecution, are not unconstitutional.[20] Neither is a statute allowing the court to admit a juror as competent, although he has formed and expressed an opinion of the guilt or innocence of the accused, if the court is satisfied that he will render an impartial verdict.[21] The jury must be drawn from the vicinage. This is provided in the sixth amendment to the federal constitution (which relates, however, only to the United States courts) and in the constitutions of many of the states. But even if this requirement is not mentioned, still it is a necessary ingredient of trial by jury, as the same was understood and practiced at common law, and therefore is to be understood as secured by constitutional provisions which, reaffirming the common law on this subject, guaranty the right of jury trial in general terms.[22]

The right of trial by jury also includes the right to have the jury render a verdict, or at least to have their service continue until there occurs some sufficient legal reason for their discharge. Hence the unauthorized discharge of the jury is equivalent to an acquittal.[23] And hence, also, after the jury has been impaneled, the state cannot enter a nolle prosequi without the consent of the accused.[24] Another important safeguard to the accused, in this connection, is the independence of the jury. In criminal cases the determination of the law is for the court, and not for the jury; in other words, the

[18] Doebler v. Com., 3 Serg. & R. (Pa.) 237; Moore v. State, 72 Ind. 358; Norval v. Rice, 2 Wis. 22; People v. O'Neil, 48 Cal. 257; Collins v. State, 88 Ala. 212, 7 South. 260.

[19] Palmore v. State, 29 Ark. 248.

[20] Dowling v. State, 5 Smedes & M. (Miss.) 664; Walter v. People, 32 N. Y. 147; Hartzell v. Com., 40 Pa. St. 462.

[21] Palmer v. State, 42 Ohio St. 596.

[22] People v. Powell, 87 Cal. 348, 25 Pac. 481. But compare Com. v. Davidson, 91 Ky. 162, 15 S. W. 53.

[23] McCauley v. State, 26 Ala. 135. [24] State v. Thompson, 95 N. C. 596.

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jury are not judges of the law.[25] But the jury cannot be coerced in respect to the verdict which they shall render, nor are they bound to assign reasons for their conclusion. It is their duty to follow the instructions of the court upon the law of the case. But if they will not do so, but render a verdict incompatible with the instructions, they cannot be punished for so doing.[26]

In nearly all the states, it is the understanding that the right of trial by jury was not intended to be secured except in the prosecution of indictable offenses, or of such crimes as were triable by jury at common law. It has not been usual to grant this right in cases where the offense charged is a trivial or minor misdemeanor, such as comes under the cognizance of police magistrates or other like judicial officers. Thus, trials for vagrancy, disorderly conduct, the violation of police ordinances of cities, disturbing religious meetings, and ordinary breaches of the peace, are not held to be within the class of prosecutions where trial by jury is claimable as of right.[27] Again, it is necessary to remember that not all proceedings which may result in punishment or restraint of liberty are "criminal prosecutions," within the meaning of the constitutional clause under consideration. Thus, a person guilty of contempt of court may be committed to jail or fined without a trial by jury.[28] So, also, the action of a police magistrate, in committing a minor child to the industrial school, does not amount to a criminal prosecution, nor to procedure according to the course of the common law, and hence the minor is not entitled to a trial by jury.[29] So the power given to courts-martial to punish by fine is not within the provision of the federal constitution securing trial by jury.[30]

Although the statute may authorize a trial without a jury in the first instance, yet if, at the same time, the defendant is granted an unfettered and unqualified right of appeal, by a simple and reason-

[25] Sparf v. U. S., 156 U. S. 51, 15 Sup. Ct. 273.

[26] Penn's Case, 6 How. St. Tr. 951; Bushell's Case, Vaughan, 135.

[27] Wong v. Astoria, 13 Or. 538, 11 Pac. 295; People v. Justices, 74 N. Y. 406; Byers v. Com., 42 Pa. St. 89; State v. Glenn, 54 Md. 572; Inwood v. State, 42 Ohio St. 186.

[28] Ex parte Grace, 12 Iowa, 208; Ex parte Terry, 128 U. S. 289, 9 Sup. Ct. 77; In re Debs, 158 U. S. 564, 15 Sup. Ct. 900.

[29] Ex parte Ah Peen, 51 Cal. 280. [30] Rawson v. Brown, 18 Me. 216.

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able procedure, and can claim a jury trial in the appellate court as of right, it cannot be said that he is deprived of his constitutional right in this regard.[31] But this doctrine has been repudiated and denied, so far as concerns the courts of the United States.[32]

Where a prisoner pleads guilty to an indictment for murder, the court, if the laws of the state permit, may proceed to inquire on evidence, without the intervention of a jury, in what degree of murder the accused is guilty, and may find him guilty of murder in the first degree, and sentence him to death, without violating the constitutional requirement of due process of law.[33]

PRIVILEGE AGAINST SELF-CRIMINATING EVIDENCE.

250. The constitutions, national and state, provide that no person shall be compelled, in any criminal case, to be a witness against himself, or to furnish evidence against himself.

This guaranty does not create any new right, but merely re-affirms a common-law privilege. It is directed against the extraction of confessions by torture or otherwise, and against the inquisitorial method of trial.[34] The seizure or compulsory production of a man's private books or papers, to be used in evidence against him, is equivalent to compelling him to be a witness against himself, and, in a prosecution for a crime, penalty, or forfeiture, is equally within the constitutional prohibition.[35]

This privilege, however, is confined to such cases or proceedings

[31] Brown v. Epps, 91 Va. 726, 21 S. E. 119; Jones v. Robbins, 8 Gray (Mass.) 329; City of Emporia v. Volmer, 12 Kan. 622; Wong v. Astoria, 13 Or. 538, 11 Pac. 295.

[32] Callan v. Wilson, 127 U. S. 540, 8 Sup. Ct. 1301.

[33] Hallinger v. Davis, 146 U. S. 314, 13 Sup. Ct. 105.

[34] 2 Story, Const. § 1788.

[35] Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524; State v. Davis, 108 Mo. 666, 18 S. W. 894. But where defendant, resisting a lawful arrest, is seized and searched for weapons, and a pistol taken from him, and he is afterwards indicted and tried for carrying concealed weapons, evidence of the finding of the pistol upon his person is properly admitted, and violates none of his constitutional rights Chastang v. State, 83 Ala. 29, 3 South. 304.

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as are criminal in form or criminal in their nature and consequences. It does not extend to cases involving questions of property only.[36] But it applies to proceedings before a grand jury, as well as before the traverse jury; the defendant cannot be compelled to testify before the grand jury.[37] And it applies to all proceedings which, though civil in form, are really criminal in their nature; such, for example, as an action under the alien contract labor law to recover the statutory penalty.[38] And in Massachusetts it is held that the privilege applies to investigations ordered or conducted by the legislature, or either of its branches, and such investigations are regulated, in this respect, by the same rules as are judicial inquiries.[39]

It is not error to require and compel the prisoner to stand up for the purpose of being identified by a witness on the stand; and it is proper to ask a witness to look around the court room, and point out the person who committed the offense. This does not involve compelling the accused to furnish evidence against himself.[40] But the constitutional provision will prevent the court from compelling the prisoner to submit to an examination of his person, or from compelling him to exhibit to the jury marks, scars, deformities, or other physical peculiarities, or to try on articles of clothing or footwear, or to insert his feet into footprints or casts of the same, or from compelling a female prisoner to undergo a surgical examination to determine whether she has borne a child, and other such tests, when the object thereof is to acquire evidence, as to identity or otherwise, which may aid in the conviction of the prisoner.[41]

The constitutional privilege of refusing to give self-criminating testimony was not intended to shield the witness from the personal

[36] Devoll v. Brownell, 5 Pick. (Mass.) 448; Keith v. Woombell, 8 Pick. (Mass.) 217.

[37] Boone v. People, 148 Ill. 440, 36 N. E. 99.

[38] Lees v. U. S., 150 U. S. 476, 14 Sup. Ct. 163.

[39] Emery's Case, 107 Mass. 172.

[40] People v. Gardner, 144 N. Y. 119, 38 N. E. 1003; State v. Johnson, 67 N. C. 55.

[41] People v. McCoy, 45 How. Prac. (N. Y.) 216; State v. Jacobs, 5 Jones (N. C.) 259; Blackwell v. State, 67 Ga. 76; People v. Mead, 50 Mich. 228, 15 N. W. 95; Stokes v. State, 5 Baxt. (Tenn.) 619; Union Pac. Ry. Co. v. Botsford, 141 U. S. 250, 11 Sup. Ct. 1000. But this rule is not universally admitted. See State v. Ah Chuey, 14 Nev. 79; State v. Johnson, 67 N. C. 55.

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disgrace or opprobrium attaching to the exposure of his crime, but only from actual prosecution and punishment. Hence if the crime in which he was implicated was such that a prosecution against him is barred by the statute of limitations, or if he has already received a pardon for it, he may be compelled to answer.[42] And a witness cannot avoid answering any question by the mere statement that the answer would tend to incriminate him, without regard to whether the statement is reasonable or not. On the contrary, it is for the judge before whom the question arises to decide whether an answer thereto may reasonably have a tendency to criminate the witness, or to furnish proof of an element or link in the chain of evidence necessary to convict him of a crime. But where, from the evidence and the nature of the question, the court can definitely determine that the question, if answered in a particular way, will form a link in the chain of evidence to establish the commission of a crime by the witness, the court cannot inquire whether the witness claimed his privilege in good faith or otherwise. It is only where the criminating effect of the question is doubtful that the motive of the witness may be considered, for in such case his bad faith would tend to show that his answer would not subject him to any danger.[43]

In the great case of Counselman v. Hitchcock,[44] it was held that this provision in the federal constitution was not confined to a criminal case against the party himself, but that its object was to insure that one should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he had committed a crime. It was also held that Rev. St. U. S. § 860, which provides that no evidence given by a witness shall be in any manner used against him in any court of the United States in any criminal proceedings, did not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and was not a full substitute for that prohibition; and that it afforded "no protection against that use of compelled testimony, which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party." But a later act

[42] Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644; Childs v. Merrill, 66 Vt. 302, 29 Atl. 532.

[43] Ex parte Irvine, 74 Fed. 954. [44] 142 U. S. 547, 12 Sup. Ct. 195.

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of congress provides that no person shall be excused from giving evidence or testifying before the interstate commerce commission on the ground that the evidence or testimony would criminate him, but that no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of anything concerning which he may testify or produce evidence before said commission. And it is held that this act completely shields the witness against any criminal prosecution which might be aided, directly or indirectly, by his testimony, and in effect operates as a pardon for the offense to which it relates, and therefore the act is not in conflict with the provisions of the constitution.[45]

In many of the states, it is the privilege of the prisoner to testify in his own behalf if he chooses to do so, and, if he does, he may be cross-examined like any other witness. But, if he prefers not to take the stand, it would not be right that he should be exposed to any prejudice in consequence of his omission to do so, for in that case he would not receive the full benefit of his constitutional privilege. Consequently, in those states, it is usually forbidden to the court and counsel to make any comment on the prisoner's omission to testify, or to draw any inferences therefrom with a view to influencing the jury.

CONFRONTING WITH WITNESSES.

251. It is a constitutional right of a person on trial for a criminal offense to be confronted with the witnesses against him, or to "meet the witnesses face to face."

This constitutional guaranty was intended as a safeguard against secret and inquisitorial methods of trial, and to secure to the defendant the privilege of sifting and trying the evidence adduced against him, by cross-examination.

The right to be confronted with the witnesses can be invoked only in criminal cases properly so called. It is not claimable as a matter of constitutional right in an action to enforce a forfeiture or penalty under the revenue laws,[46] nor in proceedings for contempt because of the violation of an injunction.[47] But in all criminal prosecutions,

[45] Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644.

[46] U. S. v. Zucker, 161 U. S. 475, 16 Sup. Ct. 641.

[47] State v. Mitchell, 3 S. D. 223, 52 N. W. 1052.

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of whatever sort or degree, the accused has the right to be confronted with the witnesses against him. Thus, on the trial of an impeachment, a law requiring the taking of testimony by examiners, not in the presence of the court, cannot be put into effect without violating the rights of the accused.[48]

The admission of dying declarations as evidence in a murder trial is not repugnant to this constitutional provision. The reason is that the "witness against him" in this case is the person who narrates the declaration made by the decedent, or who produces and identifies the same, if it was reduced to writing.[49] And depositions in a criminal case, taken de bene esse, under a stipulation by counsel that they shall be read on the trial with the same force and effect as if the witnesses had testified, are not open to objection on this ground.[50] On the same principle, the reading in evidence, on a trial for a criminal offense, of a deposition taken, or notes of evidence made, on the preliminary examination before a magistrate, in defendant's presence, when he had an opportunity to cross-examine the witness, who is dead or out of the jurisdiction or not to be found at the time of the trial, is not a denial of defendant's right to be confronted with the witnesses.[51] A statute providing that a continuance in a criminal case for the absence of a material witness may be defeated by an admission that such witness, if present, would testify as alleged in the affidavit for continuance, without admitting the absolute truth of his testimony, is not in conflict with this constitutional guaranty.[52] And if the defendant consents, the court may properly send the jury, unaccompanied by the defendant, to inspect the premises where the crime was committed, as such view

[48] State v. Buckley, 54 Ala. 599.

[49] Mattox v. U. S., 156 U. S. 237, 15 Sup. Ct. 337; State v. Baldwin (Wash.) 45 Pac. 650; Green v. State, 66 Ala. 40; Robbins v. State, 8 Ohio St. 131; Walston v. Com., 16 B. Mon. (Ky.) 15; State v. Dickinson, 41 Wis. 299; People v. Green, 1 Denio (N. Y.) 614.

[50] People v. Molins (Gen. Sess.) 10 N. Y. Supp. 130.

[51] Mattox v. U. S., 156 U. S. 237, 15 Sup. Ct. 337; People v. Fish, 125 N. Y. 136, 26 N. E. 319; People v. Dowdigan, 67 Mich. 95, 38 N. W. 920; Com. v. Cleary, 148 Pa. St. 26, 23 Atl. 1110; State v. Harman, 27 Mo. 120.

[52] Keating v. People, 160 Ill. 480, 43 N. E. 724; Hoyt v. People, 140 Ill. 588, 30 N. E. 815.

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does not constitute evidence in the case, but is merely intended to enable the jury to understand and apply the evidence.[53]

Although the accused has the right to be confronted with the witnesses against him, yet if they are absent by his wrongful procurement, or when enough has been proved to cast upon him the burden of showing that he has not been instrumental in concealing them or keeping them away, and he, having full opportunity therefor, fails to show this, then he is in no condition to assert that his constitutional right has been violated if the court allows competent evidence of the testimony which they gave on a previous trial between the government and him on the same issue; such evidence is admissible.[54]

COMPELLING ATTENDANCE OF WITNESSES.

252. The constitutional right of the defendant in a criminal prosecution to have compulsory process for securing the attendance of witnesses in his behalf grows out of the right of such defendant to rebut the charge brought against him, by the testimony of witnesses, and includes the right to examine such witnesses and to compel them to answer admissible questions under oath.

The right of a person accused of crime to adduce testimony in his own behalf was not a common law right, at least in cases of treason or felony, nor, comparatively speaking, was it of very early origin in English law. The privilege of having witnesses speak to exculpatory facts was grudgingly accorded, but they were not put under oath, and their statements were consequently not regarded as evidence which the jury must take into account. It was not until the first year of the reign of Anne that the same privilege in this respect was granted to the prisoner as to the crown. But the recognition of this right was regarded as one of the most important of the reforms in the law of criminal procedure, and the right itself was justly considered by the framers of our constitutions as one of the most valuable guaranties of liberty.[55]

[53] Shular v. State, 105 Ind. 289, 4 N. E. 870. Compare State v. Bertin, 24 La. Ann. 46.

[54] Reynolds v. U. S., 98 U. S. 145.

[55] See 4 Bl. Comm. 360, 441.

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A statute which permits the prosecuting attorney to admit that an absent witness would testify to the facts as set forth in the affidavit on motion by the defendant for a continuance, if he were personally present, and thereby compel the defendant to go to trial without the benefit of his testimony, is unconstitutional.[56] But this right does not give the accused a claim against the state for payment of the fees of the witnesses summoned in his defense.[57] But a rule of court prohibiting the issue of more than five subpœnas for witnesses without an order of court, obtainable on application showing the materiality of the witnesses, violates defendant's constitutional right to have compulsory process for obtaining witnesses.[58] And a statute providing that whoever steals property in another state or country, and brings it into the state enacting the statute, may be punished for larceny, violates this provision of the constitution, since process of a court of that state cannot reach witnesses where the property was taken.[59]

RIGHT TO BE PRESENT AT TRIAL.

253. The right of a person charged with crime to be present at his trial is claimable in all cases of felony where his life or liberty is put in jeopardy, and it includes the right to be personally present in court at each and every material step which affects the substantive question of his guilt or innocence.

The right of the defendant in a criminal prosecution to be present at his trial, though not usually specifically granted by the constitutions, follows necessarily from his right to be heard and to be confronted with the witnesses against him, and from the prohibition against depriving him of his life, liberty, or property without due process of law.

The prisoner must be present at each stage of the trial, from the impanelling of the jury to the sentence. But matters of routine or

[56] State v. Berkley, 92 Mo. 41, 4 S. W. 24.

[57] State v. Waters, 39 Me. 54. And see Jenkins v. State, 31 Fla. 190, 12 South. 680.

[58] Aikin v. State, 53 Ark. 544, 25 S. W. 340.

[59] Territory v. Hefley (Ariz.) 33 Pac. 618.

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motions not affecting the merits may be determined in his absence, unless it is shown that he was prejudiced thereby. He may also forfeit his right to be present by his own misconduct. If he is so boisterous, unruly, or disorderly that it becomes necessary to remove him from the court-room in order to allow the trial to proceed, this may be done, without infringing upon his constitutional rights, except, perhaps, in capital cases.[60] A charge of a mere misdemeanor, or breach of a police ordinance, may lawfully be tried in the absence of the accused, if he was legally arrested.[61]

While the prisoner must be present in the trial court when sentence is passed upon him, yet it is not essential that he should be present in an appellate court when the latter affirms the judgment of the trial court, without passing any new judgment. He has no constitutional right in that regard, and the sentence, thus affirmed, is not invalid because of his absence.[62]

ASSISTANCE OF COUNSEL.

254. The constitution of the United States, and the constitutions of many of the states, provide that the accused shall have the assistance of counsel for his defense.

Although it was permitted by the common law that an accused person should have the benefit of the advice and assistance of counsel, it was not until a comparatively recent period in English law that counsel for the prisoner were allowed to address the jury in his behalf. Under our constitutional provisions, the right to have the assistance of counsel includes the right of the prisoner to have a private interview and consultation with his counsel before the trial, or even before indictment found, if he is under arrest, in order to take his advice and instruct him as to the defense to be made.[63] And the fact that one accused of crime is himself a lawyer does not deprive him of the right to be represented by counsel, and he must be given an opportunity to procure professional assistance in his de-

[60] U. S. v. Davis, 6 Blatchf. 464, Fed. Cas. No. 14,928.
[61] City of Bloomington v. Heiland, 67 Ill. 278.
[62] Schwab v. Berggren, 143 U. S. 442, 12 Sup. Ct. 525.
[63] People v. Riseley, 13 Abb. N. C. (N. Y.) 186.

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fense.[64] But the guaranty that a person accused of crime shall be entitled to the assistance of counsel does not include a guaranty that such counsel shall be furnished at the expense of the public.[65]

An important part of the right secured by this provision of the constitutions is that it secures to the prisoner's counsel freedom and independence in his management of the case and in his examination of witnesses and his comments and arguments. Subject to such restrictions as are necessary to secure the dignity of the court, and to the ordinary rules of propriety, he may say and do all that he deems necessary for the defense of his client, and for what he may utter in the course of the trial he is not to be held to account elsewhere, unless, indeed, he wantonly departs from the evidence and point in issue, and maliciously and slanderously abuses the private character of some person concerned.[66] And that counsel may be free to attend to the business of his client without hindrance or interruption, he will be exempt from the service of process upon him while he is actually in attendance upon the court in the interests of the client.[67]

Furthermore, in order that the accused may be safe in confiding freely in his counsel, it is a rule that communications passing between them, made with a view to the expected or pending trial, are "privileged," and counsel will neither be forced nor allowed to divulge such communications without the consent of the client. "To entitle a communication to be privileged, it is not essential that it should be made with any special injunction of secrecy, or that the client should understand the extent of the privilege. But if it be made with a view to professional employment, and in reference to such employment in legal proceedings pending or contemplated, or in any other legitimate professional services, wherein professional aid or advice is sought respecting the rights, duties, or liabilities of the client, it will fall within the privilege, and cannot be disclosed by counsel. This, however, is a rule of law for the protection of the

[64] People v. Napthaly, 105 Cal. 641, 39 Pac. 29.

[65] Houk v. Board of Com'rs of Montgomery County, 14 Ind. App. 662, 41 N. E. 1068.

[66] Munster v. Lamb, 11 Q. B. Div. 588. And see Gray v. Pentland, 2 Serg. & R. (Pa.) 23.

[67] Central Trust Co. v. Milwaukee St. Ry. Co., 74 Fed. 442.

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client, which he is at liberty to waive."[68] But an attorney may be required to produce documents placed in his hands by his client when the client is charged with a criminal offense in respect to such documents, as, where he has forged an instrument and placed it in the hands of his attorney when his crime was detected.[69] "And the privilege does not extend to parties seeking for information or advice as to the best mode of infringing the law; communications of an intended offense must be disclosed."[70]

RIGHT TO BE HEARD.

255. A person on trial for a criminal offense has a constitutional right to be heard in his own defense in person and by counsel; but the exercise of this right may be restrained within reasonable limits.

"The court has no discretionary power over the right itself, for it cannot be denied. And hence it has no right to prevent the accused from being heard by counsel, even if the evidence against him be clear, unimpeached, and conclusive in the opinion of the court. But the exercise of the right is subject to judicial control to the extent that is necessary to prevent the abuse of it." Hence the court may, in its discretion, limit the time allowed to the accused or his counsel for argument, provided the prisoner is not thereby deprived of a fair trial and a full hearing.[71] Where a witness was fully cross-examined by the prisoner's counsel, and then permission was asked for the defendant to examine the witness himself, but was refused, it was adjudged that the court did not thereby infringe or deny the prisoner's constitutional right of defense by himself, his counsel, or both.[72] Unless changed by statute in the particular jurisdiction, the general rule is that in all criminal trials the prosecution has the right to open the case and to make the closing argument

[68] McLellan v. Longfellow, 32 Me. 494. And see Sargent v. Hampden, 88 Me. 581; State v. Dawson, 90 Mo. 149, 1 S. W. 827.

[69] Reg. v. Brown, 9 Cox Cr. Cas. 281.

[70] Weeks, Attys. at Law (2d Ed.) § 170.

[71] Dille v. State, 34 Ohio St. 617; Hart v. State, 14 Neb. 572, 16 N. W. 905; State v. Boasso, 38 La. Ann. 202.

[72] Roberts v. State, 14 Ga. 18.

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to the jury, since the state must assume the general burden of proving the guilt of the accused.[73] A person charged with crime has a right to plead, free from restraint and fear of violence; and where the accused is forced, through terror of mob violence, to enter a plea of guilty, he has a right to relief from the judgment entered on such plea.[74] It is also a rule that counsel for the prosecution, in his argument to the jury, must keep within the limits of the evidence. If his remarks include statements or suggestions, calculated to prejudice the jury against the prisoner and to induce a verdict against him, which are not warranted by anything contained in the evidence in the case, such misconduct, unless promptly and adequately neutralized by the court, may be ground for giving the defendant, upon conviction, a new trial.[75]

SPEEDY AND PUBLIC TRIAL.

256. Another protection to those charged with crime is found in the constitutional guaranty that they shall have the benefit of a speedy and public trial.

Speedy Trial.

By a speedy trial is meant a trial conducted according to fixed rules, regulations, and proceedings of law, free from vexatious, capricious, and oppressive delays manufactured by the ministers of justice.[76] "The speedy trial to which a person charged with crime is entitled under the constitution is a trial at such a time, after the finding of the indictment, regard being had to the terms of court, as shall afford the prosecution a reasonable opportunity, by the fair and honest exercise of reasonable diligence, to prepare for a trial; and if the trial is delayed or postponed beyond such period, when there is a term of court at which the trial might be had, by reason of the neglect or laches of the prosecution in preparing for trial, such delay is a denial to the defendant of his right to a speedy trial," and

[73] Loeffner v. State, 10 Ohio St. 598; State v. Schnelle, 24 W. Va. 767; U. S. v. Bates, 2 Cranch C. C. 405, Fed. Cas. No. 14,543.

[74] Sanders v. State, 85 Ind. 318.

[75] See Epps v. State, 102 Ind. 539, 1 N. E. 491.

[76] Stewart v. State, 13 Ark. 720; Nixon v. State, 2 Smedes & M. (Miss.) 497, 507; Ex parte Stanley, 4 Nev. 113, 116.

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he is entitled to be discharged from imprisonment on habeas corpus.[77] But if the defendant demands a jury trial after the panel of jurors has been discharged, it is no violation of this right for the court to continue the cause on its own motion until such time as a jury can be lawfully impanelled.[78]

Public Trial.

The guaranty of a "public" trial is intended to secure to the accused the help and countenance of his friends and counsel and of those who could assist him in his defense. This right does not abridge the power of the trial court, in certain emergencies, as when it becomes necessary to clear the court-room in the interests of the public morals, or to expel a boisterous and unruly audience, to protect an embarrassed or intimidated witness, or to exclude, for other good reasons, all but a reasonable and respectable number of the public, allowing those only to remain who are in attendance on the court or are its officers and members of its bar and those who can be of help or service to the prisoner.[79]

TWICE IN JEOPARDY.

257. By the constitution of the United States, as well as the constitutions of most of the several states, it is provided that no man shall, for the same offense, be twice put in jeopardy.

258. Jeopardy means danger of punishment.

259. A man is considered to have been put in jeopardy when a valid and sufficient indictment or information has been legally found against him and duly presented to a court of competent jurisdiction over both the person and the offense, and thereupon he has been arraigned and has pleaded, and a lawful jury has been impanelled and sworn and charged to try the case and render a verdict.

[77] U. S. v. Fox, 3 Mont. 512, 517.

[78] City of Creston v. Nye, 74 Iowa, 369, 37 N. W. 777.

[79] People v. Swafford, 65 Cal. 223, 3 Pac. 809; People v. Murray, 89 Mich. 276, 50 N. W. 995.

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This privilege, like many other valuable guaranties in criminal cases, is not the creature of the constitutions, but has its roots deeply imbedded in the universal principles of reason and justice, and derives its substance from the ancient and uninterrupted rules and practices of the common law.[80] It is true that at common law the right was restricted to the highest grades of crimes, and the retention, in many of the constitutions, of the ancient phrase "jeopardy of life or limb" would seem to indicate that, in this respect, the common law was to be adopted and followed. But numerous states, in incorporating the provision in their constitutions, have omitted the limiting words. And in all, it is believed, the process of judicial construction, proceeding on the rule that a remedial provision and one making in favor of liberty is to be liberally interpreted, has extended the right so as to make it apply to all indictable offenses, including misdemeanors. This provision, it is said, extends the common law maxim, nemo debet bis puniri pro uno delicto, which was limited to felonies, to all grades of offenses. And it is but the application to criminal jurisprudence of a more general maxim, namely, that no one shall be twice vexed for one and the same cause. The object of incorporating it in the fundamental law was to render it, as respects criminal causes, inviolable by any department of the government.[81]

Elements.

In order to constitute legal jeopardy, all the elements enumerated in the text above must concur. And in the first place, there must be a valid indictment. If the indictment is so defective in form or substance that a conviction founded upon it would be at once set aside, for that cause alone, there is no legal jeopardy. Thus, it must be found by a legally constituted grand jury.[82] And it must charge an offense recognized and denounced by the law under which the trial is to be had, and must set forth the charge formally and sufficiently. It must not only state all the facts which constitute the offense intended to be charged, but must state them with such certainty and precision that the defendant may judge whether they constitute an indictable offense or not, and may demur or plead accord-

[80] 4 Bl. Comm. 335.
[81] State v. Behimer, 20 Ohio St. 572.
[82] Finley v. State, 61 Ala. 201.

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ingly, and may be able to plead his conviction or acquittal in bar of another prosecution for the same offense.[83]

In the next place, the proceeding must be had before a court of competent jurisdiction. That is, the court must have jurisdiction of the person, by his being legally before it, and it must have jurisdiction of the offense. And in order to comply with the latter requisite, the crime charged must be one which is defined and made punishable by the law under which the court acts, and which the same law has committed to the jurisdiction of the particular court, or to courts of the grade or character of the particular court, and further, the offense must have been committed within the territorial limits to which the jurisdiction of the court extends. Thus, an acquittal by a jury in a court of the United States of a defendant who is there indicted for an offense of which that court has no jurisdiction, is no bar to an indictment against him for the same offense in a state court having jurisdiction.[84] And again, the court must be a competent and lawful court. For if it is organized and acting under an unconstitutional statute, it is no court, and its judgments are nullities, and no legal jeopardy can arise from a trial before it.[85]

In the next place, jeopardy does not arise until there has been an arraignment and plea. If there is no arraignment, or a waiver of it, the trial is a nullity, and jeopardy does not attach.[86] And until the defendant has entered his plea, or it has been entered for him upon his refusal to plead, he cannot be put in jeopardy.[87]

Finally, the jury must be sworn and impanelled and charged with the prisoner's deliverance. (The last phrase means that they are charged to try the case and render a true verdict upon the law and evidence.) At this point, according to the general consensus of judicial opinion, jeopardy attaches, and whatever proceedings may there-

[83] State v. Taylor, 34 La. Ann. 978; Davidson v. State, 99 Ind. 366; Fink v. City of Milwaukee, 17 Wis. 26.

[84] Com. v. Peters, 12 Metc. (Mass.) 387. The fact that one has been once arrested and examined before a magistrate and discharged is not a bar to a second arrest and examination on the same charge. Ex parte Fenton, 77 Cal. 183, 19 Pac. 267.

[85] Rector v. State, 6 Ark. 187; McGinnis v. State, 9 Humph. (Tenn.) 43.

[86] Newson v. State, 2 Ga. 60; Davis v. State, 38 Wis. 487; Douglass v. State, 8 Wis. 820.

[87] Douglass v. State, 8 Wis. 820.

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after be had in the case, the prisoner cannot be again tried for the same offense. It seems to be conceded, however, that if the jury are discharged without a verdict on account of some imperative necessity, such as the sickness of the judge, or the sickness, insanity, or misconduct of a juror, a second trial may lawfully be had. And some very respectable authorities hold that if the jury are discharged because they cannot agree upon a verdict, or if judgment upon the verdict has been arrested, or even if there is a failure to obtain a verdict for any cause, there is no legal jeopardy. The discussion of this question does not fall within the scope of this work, but some of the instructive cases are referred to in the margin.[88]

The second prosecution must be for the same offense. The offenses charged in the two indictments must be the same both in law and fact. The test for determining their identity is said to be the question whether or not the facts set forth in the second indictment, if proved to be true, would have warranted a conviction under the first indictment, or whether or not the facts charged in the second constitute one and the same transaction with that alleged in the first.[89] Where an indictment contains several counts, and the prisoner is acquitted on some counts and convicted on others, he cannot be again tried on those counts on which he was acquitted, though, if the conviction is set aside, he may be tried a second time on those counts on which he was at first convicted.[90] And where a greater offense includes a lesser one, if the defendant is indicted for the lesser offense and put in jeopardy under such indictment, this will prevent his being afterwards indicted and tried for the major crime.[91] Thus, where defendant was charged with robbery, commit-

[88] People v. Hunckeler, 48 Cal. 331; People v. Cage, Id. 323; Mixon v. State, 55 Ala. 129; U. S. v. Haskell, 4 Wash. C. C. 402, Fed. Cas. No. 15,321; Com. v. McCormick, 130 Mass. 61; Powell v. State, 17 Tex. App. 345; Barrett v. State, 35 Ala. 406; Benedict v. State, 44 Ohio St. 679, 11 N. E. 125; State v. Shaffer, 23 Or. 555, 32 Pac. 545.

[89] McCoy v. State, 46 Ark. 141; Roberts v. State, 14 Ga. 8. A statute providing that a person who has been before convicted of crime shall suffer a severer punishment for a subsequent offense than for a first offense is not invalid, as subjecting him to be twice put in jeopardy for the same offense. Moore v. Missouri, 159 U. S. 673, 16 Sup. Ct. 179.

[90] People v. Dowling, 84 N. Y. 478; Johnson v. State, 29 Ark. 31. Compare Jarvis v. State, 19 Ohio St. 585.

[91] Roberts v. State, 14 Ga. 8.

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ted by taking money from a dwelling house, a former acquittal on an indictment for the larceny of the same money is a bar to the prosecution for robbery, because the crime of robbery, as charged, could not have been committed without the commission of larceny, as an included, but inferior, offense.[92] In the case of a single criminal act, producing several different results, each of which, standing alone and dissociated from the others, would be an indictable offense, the general rule is that each result cannot be considered a distinct crime, but that all are the consequences of one criminal act; and hence a conviction or acquittal of the crime, founded upon one of such results, will bar a prosecution for the same crime, founded upon another of such results.[93] If a verdict against the prisoner is set aside on his motion, or on an appeal or writ of error taken by him, or is arrested for fatal errors in the indictment, the protection of former jeopardy does not attach.[94]

Practical Effect.

The practical effect of the provision against second jeopardy is not only to save a person from being twice tried for the same offense in distinct proceedings, but also to deny to the prosecution, in criminal cases, the right to take an appeal or to move for a new trial, unless, in the particular state, the constitutional rule has been relaxed so far as to allow this. And except in cases where the prisoner himself appeals and a new trial is thereupon ordered, there is no redress for errors or mistakes made in the course of the trial which tell in favor of the defendant, nor any opportunity to correct them. The propriety of allowing to the state the same right of appeal, in these cases, which already exists in favor of the defendant, has been of late years much discussed. Where a court has imposed a sentence of fine and imprisonment, in a case where the statute authorized only a sentence of fine or imprisonment, and the fine has been paid, the court cannot, even during the same term, modify the

[92] State v. Mikesell, 70 Iowa, 176, 30 N. W. 474.

[93] Hurst v. State, 86 Ala. 604, 6 South. 120. But contrast People v. Majors, 65 Cal. 138, 3 Pac. 597, where it was held that the murder of two persons by the same act constituted two offenses, for each of which a separate prosecution would lie, and a conviction or acquittal in one case would not bar a prosecution in the other.

[94] Sanders v. State, 85 Ind. 318; Smith v. State, 41 N. J. Law, 598.

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judgment by imposing imprisonment instead of the former punishment; for this would amount to punishing the defendant twice for the same offense.[95]

BAIL.

260. By the eighth amendment to the federal constitution, and by similar provisions in the constitutions of many of the states, it is provided that excessive bail shall not be required.

The constitutions of most of the states provide that all persons shall, before conviction, be admitted to bail, upon giving sufficient sureties, except for capital offenses, where proof of their guilt is evident or the presumption great; and the constitutions of nearly all provide that excessive bail shall not be required. The object of bail is to enable persons charged with criminal offenses to regain their liberty, and at the same time to secure their attendance when they are wanted for trial. To require bail in such a great amount that it would be impossible for the prisoner to obtain it, and thereby to keep him in captivity for perhaps a long time, before his guilt was established, would be a gross abuse of justice and a grievous oppression.[96] It was to prevent this that the constitutional provision above quoted was adopted. But it will be observed that the provision does not require that all persons, in all circumstances, shall be admitted to bail; but only that if they are allowed to go at large upon bail, the bail required shall not be excessive. There are obviously cases in which bail must be refused, if justice is to be done. And, as we have stated, the right to bail is generally withheld in capital cases where "the proof is evident or the presumption is great." In regard to the meaning of these words, it is said that the proof is evident if the evidence adduced on the application for bail would sustain a verdict convicting the prisoner of a capital offense; but, if the evidence is of less efficacy, bail should be allowed him. In other words, bail is not a matter of right if the evidence is clear and strong, leading a well-guarded and dispassionate judgment to the conclusion that the offense has been committed, that the prisoner is the guilty agent, and that if the law be administered he will

[95] Ex parte Lange, 18 Wall. 163. [96] U. S. v. Brawner, 7 Fed. 86.

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be capitally convicted.[97] The amount of bail to be required is left to the discretion of the court or magistrate. But if the amount required is excessive, or if an offer of reasonable bail is refused, there is such violation of the prisoner's constitutional rights as may be inquired into on a writ of habeas corpus or certiorari. But the granting or refusing of bail is a matter generally within the sound discretion of the court or magistrate below; and the appellate court will not control that discretion unless it has been flagrantly abused.[98] And the action of a judge or magistrate in accepting or refusing bail is judicial in its nature, and not merely ministerial, and no action will lie against him for refusing to take bail in a case of misdemeanor, even though the sureties tendered are found to have been sufficient, unless actual malice on his part can be shown.[99]

In fixing the amount of bail, though no definite rules can be laid down for all cases, there are certain considerations which should always influence the action of the court. Thus, it is proper to take into account the gravity of the offense charged and the severity of the punishment attached to it, as affecting the likelihood of the prisoner's fleeing from justice, notwithstanding his being under bail. Again, if there is no reasonable doubt of the guilt of the defendant charged with the commission of a felony, whether capital or not, he ought not to be admitted to bail.[100] And, finally, whether bail is excessive or not will depend largely upon the pecuniary condition of the accused. A sum which would be trivial to a wealthy man might be oppressive to a poor one.[101]

CRUEL AND UNUSUAL PUNISHMENTS.

261. The constitutional prohibition against the infliction of cruel and unusual punishments is to be understood as forbidding any cruel or degrading punishment not known to the common law, and probably also any degrading punishments which, in the particular state, had become obso-

[97] Ex parte Foster, 5 Tex. App. 625. [98] Lester v. State, 33 Ga. 192.

[99] Linford v. Fitzroy, 18 Law J. Mag. Cas. 108; Evans v. Foster, 1 N. H. 374.

[100] Ex parte Tayloe, 5 Cow. (N. Y.) 39.

[101] Ex parte Hutchings, 11 Tex. App. 28; Ex parte Banks, 28 Ala. 89; U. S. v. Lawrence, 4 Cranch, C. C. 518, Fed. Cas. No. 15,577.

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lete when its constitution was adopted, and also all punishments which are so disproportioned to the offense as to shock the moral sense of the community.[103]

This prohibition, in the eighth amendment to the federal constitution, applies only to the United States and its courts. But most of the states, if not all, have incorporated a similar inhibition in their organic law.[104] It was intended to exclude all such barbarous punishments as torture, disembowelling, burning, branding, mutilation, the pillory, and the ducking-stool. But it does not apply to the ordinary methods of punishment, such as death by hanging, pecuniary fines, imprisonment, disfranchisement, or forfeiture of civil rights.[105] But the common and usual forms of punishment, not in themselves objectionable under this provision, may be inflicted upon a defendant to such an excessive extent as to become "cruel" punishments. For example, a sentence of imprisonment for five years, and a recognizance in the sum of $500 to keep the peace for five years after the expiration of the sentence, upon a conviction for an assault and battery, has been held invalid because excessive.[106] As to the infliction of stripes, the case is not very clear. But it has been held in several cases that whipping is not a cruel or unusual punishment.[106] A law providing that execution of the sentence of death shall be by "causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death," is not obnoxious to this constitutional prohibition. The punishment, death, remains the same; and the only change is in the manner of its infliction, and this manner, though certainly at present "unusual," is

[103] In re Bayard, 25 Hun (N. Y.) 546. [104] Pervear v. Com., 5 Wall. 475.

[105] Fine and imprisonment are not cruel or unusual punishments. Ligan v. State, 3 Heisk. (Tenn.) 159. Hard labor in the penitentiary, in addition to the imprisonment, is not a cruel or unusual punishment. Wilson v. State, 28 Ind. 393. A law providing that the keeper of a gambling house "shall be deemed infamous after conviction, and be forever thereafter disqualified from exercising the right of suffrage and from holding any office," does not inflict a cruel punishment, within the meaning of the constitution. Harper v. Com., 93 Ky. 290, 19 S. W. 737.

[106] State v. Driver, 78 N. C. 423. But compare People v. Smith, 94 Mich. 644, 54 N. W. 487.

[106] Com. v. Wyatt, 6 Rand. (Va.) 694; Foote v. State, 59 Md. 264.

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not "cruel" within the meaning of the constitution.[107] And in a case where a territorial law enacted that every person guilty of murder should suffer death, but did not prescribe the mode of executing the sentence, and the prisoner was sentenced to be shot, it was held that this was not a cruel or unusual punishment.[108] And the same decision was made in regard to a statute which required that a prisoner sentenced to death should be kept in solitary confinement between the time of his sentence and the execution.[109] But where cutting off the prisoner's hair is a part of the punishment prescribed for particular offenses, and this sentence is imposed upon a Chinaman, it may be a cruel punishment as to him, on account of the peculiar social and religious beliefs of the people of that race.[110] But a sentence, imposed upon a prisoner for a violation of a city ordinance, requiring him, on default of payment of his fine, to be put to labor on the public streets or other public works of the city, is not in conflict with the constitution.[111] In an interesting case in Missouri, the prisoner was convicted of obtaining $3 under false pretenses, and was sentenced to imprisonment for two years, which was the minimum penalty set by the statute for that offense. But the statute omitted to prescribe any maximum penalty. And it was argued that, under this law, the prisoner might have been sentenced to imprisonment for life, and that such a punishment would have been cruel and unusual. But the court refused to interfere with the sentence on this ground.[112]

BILLS OF ATTAINDER.

262. By the provisions of the federal constitution, bills of attainder are forbidden to be passed either by congress or by the several states.

In its strict signification, the word "attainder" means an extinction of civil and political rights; and its two incidents, forfeiture and

[107] People v. Kemmler, 119 N. Y. 580, 24 N. E. 9; In re Kemmler, 136 U. S. 436, 10 Sup. Ct. 930.

[108] Wilkerson v. Utah, 99 U. S. 130.

[109] McElvaine v. Brush, 142 U. S. 155, 12 Sup. Ct. 156.

[110] Ho Ah Kow v. Nunan, 5 Sawy. 552, Fed. Cas. No. 6,546.

[111] Ex parte Bedell, 20 Mo. App. 125.

[112] State v. Williams, 77 Mo. 310.

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corruption of the blood, followed as a necessary consequence, at common law, upon a conviction of a capital crime. A bill of attainder is a legislative decree, directed against a designated person, pronouncing him guilty of an alleged crime (usually treason) and passing sentence of death and attainder upon him.[113] In some cases, where this method of procedure was in use, the sentence pronounced was less severe than the death penalty, and in that case the judgment was denominated a "bill of pains and penalties." But the phrase "bill of attainder" has come to be used in a generic sense, including also a bill of pains and penalties, and it is in this comprehensive signification that it is used in the federal constitution.[114] Legislative enactments of this character were not at all uncommon in the early days of this country, before the adoption of the constitution. In several cases, during the Revolution, the states enacted statutes which were directed against particular persons by name, and which adjudged them guilty of aiding and adhering to the enemies of the state, and proceeded to a confiscation of such property of theirs as might be found within the limits of the state.[115] But the prohibition received its most attentive consideration in a group of cases which arose out of a certain act of congress and certain acts of the state legislatures, passed at the close of the civil war, which imposed a test oath of past loyalty to the national government as a condition precedent to the right to enjoy certain civil and political privileges. These statutes were held to be ex post facto laws and unconstitutional. And they were also adjudged to be bills of attainder, on the following ground: Since it was certain that there were individuals who would be unable to take the oath prescribed, the legislative action in question was tantamount to a declaration that those persons were guilty of the crimes alleged, and to a sentence, passed upon them without trial, imposing heavy penalties for their past conduct.[116]

[113] Cummings v. Missouri, 4 Wall. 277.

[114] Fletcher v. Peck, 6 Cranch, 138; Cummings v. Missouri, 4 Wall. 277.

[115] See Thompson v. Carr, 5 N. H. 510.

[116] Cummings v. Missouri, 4 Wall. 277; Ex parte Garland, Id. 333; Pierce v. Carskadon, 16 Wall. 234.

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EX POST FACTO LAWS.

263. The enactment of ex post facto laws is prohibited both to congress and to the legislatures of the several states. The term is a technical one, and applies only to penal and criminal proceedings. An ex post facto law is one

(a) Which makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action, or

(b) Which aggravates a crime, or makes it greater than it was when committed, or

(c) Which changes the punishment and inflicts a greater punishment than the law annexed to the crime when it was committed, or

(d) Which alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender.[117]

An ex post facto law is necessarily, as the words imply, a retroactive law. If any law is intended to operate only upon future actions or future trials, it cannot be called ex post facto.[118] And again, the term is restricted to penal and criminal proceedings which affect life or liberty or may impose punishments or forfeitures. It has no applicability to purely civil proceedings which affect private rights only, although such proceedings, for their retroactive effect, may be unlawful.[119] The constitutional provision, it should be observed,

[117] Calder v. Bull, 3 Dall. 390.

[118] Kring v. Missouri, 107 U. S. 221, 2 Sup. Ct. 443. A general law for the punishment of offenses which endeavors, by retroactive operation, to reach acts before committed, and also provides a like punishment for the same acts in future, is void in so far as it is retroactive, but valid as to future cases within the legislative control. Jaehne v. New York, 128 U. S. 189, 9 Sup. Ct. 70.

[119] Baltimore & S. R. Co. v. Nesbit, 10 How. 395; Locke v. New Orleans, 4 Wall. 172; Southwick v. Southwick, 49 N. Y. 510; Rich v. Flanders, 39 N. H. 304. A person cannot be convicted under a law making a principal liable for the act of his agent, for an act done before the law went into operation. State v. Bond, 4 Jones (N. C.) 9.

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applies not only to the statutes of a state, but also to the ordinances of its municipal corporations.[120]

As a general rule, statutes which are confined in their operation to the regulation of courts, their jurisdiction, and criminal procedure, or which merely change the mode of trial of offenses, without affecting the nature of the offense, the evidence required, or the punishment, are not ex post facto, even as retroactively applied, unless they plainly alter the situation of the accused to his disadvantage.[121] For instance, a statute giving to justices of the peace jurisdiction to try persons for offenses previously triable only in the county courts, though applicable to prior offenses, being remedial only, is not an ex post facto law.[122] The same is true of a law which confers appellate jurisdiction of a cause upon a division of the supreme court less in numbers and different in personnel from the court as organized when the crime was committed.[123] And a law which changes the qualifications of grand and petit jurors, requiring that they shall be qualified electors and able to read and write, is applicable to the trial of a prosecution for an offense committed before its passage.[124] Nor is there any valid objection, on this ground, to a provision in a state constitution that offenses previously required to be prosecuted by indictment may be prosecuted by information or by indictment, as shall be prescribed by law, or one which enacts that no grand jury shall be drawn or summoned in any county unless the superior judge thereof shall so order. These provisions, as applied to offenses committed prior to their adoption, cannot be said to be ex post facto.[125] And a law authorizing the conviction of a defendant "of any offense the commission of which is necessarily included in that charged" is not ex post facto, as applied to a case where the offense was committed and the indictment found before the law went into effect, although such conviction was not author-

[120] People v. Fire Department of City of Detroit, 31 Mich. 458.

[121] City Council of Anderson v. O'Donnell, 29 S. C. 355, 7 S. E. 523; State v. Carter, 33 La. Ann. 1214; People v. Mortimer, 46 Cal. 114.

[122] State v. Welch, 65 Vt. 50, 25 Atl. 900. And see Com. v. Phillips, 11 Pick. (Mass.) 28; State v. Sullivan, 14 Rich. Law (S. C.) 281.

[123] Duncan v. Missouri, 152 U. S. 377, 14 Sup. Ct. 570.

[124] Gibson v. Mississippi, 162 U. S. 565, 16 Sup. Ct. 904.

[125] Lybarger v. State, 2 Wash. St. 552, 27 Pac. 449, 1029.

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ized by the law in force at the time the crime was done.[126] A statute reducing the number of peremptory challenges to jurors allowed to defendants in criminal prosecutions is not ex post facto as to the trial of a crime committed before the act was passed.[127] And a statute which provides that, "in all questions affecting the credibility of a witness, his general moral character may be given in evidence," although it introduces a new rule of evidence, cannot be said to alter the situation of the accused to his disadvantage, and therefore is not an ex post facto law.[128] But a law requiring the defendant in prosecutions under the revenue laws to produce his books and papers in evidence, and making his refusal to do so equivalent to a confession of the facts the government expects to prove by them, is ex post facto as applied to past acts and transactions.[129]

If the legislature repeals the statute of limitations with respect to criminal prosecutions, or extends the time previously limited for such prosecutions, the new rule cannot constitutionally apply to any offense previously committed and as to which the period prescribed by the law in force at the time of its commission has already run. This would be, in such application, an ex post facto law; because an act condoned by the expiration of the statute of limitations is no longer a punishable offense.[130]

A law which aggravates the punishment for an act already committed is ex post facto; but one which changes the punishment in such a manner that the new penalty is equal to or less than that prescribed when the act was done, but not greater, is not thus objectionable. Any change in the law which remits a separable portion of the former penalty, or substitutes a punishment which is clearly less severe, or otherwise reduces or mitigates the consequences of a conviction, or which introduces a change in those matters which are referable only to prison discipline or penal administration, may

[126] State v. Johnson, 81 Mo. 60.

[127] South v. State, 86 Ala. 617, 6 South. 52.

[128] Robinson v. State, 84 Ind. 452.

[129] U. S. v. Hughes, 8 Ben. 29, Fed. Cas. No. 15,416.

[130] Com. v. Duffy, 96 Pa. St. 506. Compare State v. Moore, 42 N. J. Law, 208.

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validly have a retrospective operation.[181] A statute which, without affecting the crime or its punishment, prescribes the hour, the place, and the manner in which death sentences shall be carried out, and the number of persons who may be present, is not ex post facto as to past offenses.[182] Since the penalty of death is almost universally regarded as the extreme limit of punishment, it is generally conceded that a law which substitutes any other degree or kind of punishment, even in relation to past offenses, is not ex post facto.[183] But even the death penalty can be added to. Thus, a statute was enacted providing that a person sentenced to death should be kept in solitary confinement until the time of execution, and also that he should not be apprised of the time when the execution was to take place. This law was adjudged ex post facto and unconstitutional as applied to a murderer whose crime was committed before the passage of the act.[184] But a statute is not unconstitutional which, in providing for the punishment of future offenses, authorizes the offender's conduct in the past to be taken into account, and the punishment to be graduated accordingly; that is, imposing a more severe sentence upon a second conviction for the same kind of offense.[185] But where the law, in force at the time of the commission of the offense, imposed upon the jury the duty of fixing the penalty, within certain limits, by their verdict, this confers upon the prisoner a valuable right, which cannot constitutionally be taken away by retroactive legislation.[186] And a law providing that cumulative

[181] Hartung v. People, 22 N. Y. 95, 105; Hair v. State, 16 Neb. 601, 21 N. W. 464; People v. Hayes, 140 N. Y. 484, 35 N. E. 951.

[182] Holden v. Minnesota, 137 U. S. 483, 11 Sup. Ct. 143.

[183] Com. v. Gardner, 11 Gray (Mass.) 438; Com. v. Wyman, 12 Cush. (Mass.) 237; State v. Williams, 2 Rich. Law (S. C.) 418.

[184] Ex parte Medley, 134 U. S. 160, 10 Sup. Ct. 384. A law adding to the penalty of death imprisonment at hard labor until the governor shall fix the day for the execution (which may be a year from the sentence) is ex post facto as applied to past offenses. In re Petty, 22 Kan. 477.

[185] Ross' Case, 2 Pick. (Mass.) 165; People v. Butler, 8 Cow. (N. Y.) 347; Com. v. Graves, 155 Mass. 163, 29 N. E. 579; State v. Woods, 68 Me. 409.

[186] Marion v. State, 16 Neb. 349, 20 N. W. 289. But where the statute, at the time the crime was committed, provided that juries should be judges of the law, and this is repealed before the trial, there is no constitutional wrong in applying the new rule to the case at bar. Marion v. State, 20 Neb. 233, 29 N. W. 911.

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terms of imprisonment, adjudged at the same term of court, shall be so tacked that each subsequent term shall begin at the expiration of the preceding one, cannot be applied to offenses committed before the statute, because, being more onerous than the pre-existing law, such application would make it ex post facto.[187]

A statute establishing a test oath of past loyalty to the government, and making the taking of it a condition precedent to the right to hold public office, serve as a juror, practice as an attorney, or act as a professor, teacher, or clergyman, is unconstitutional and void, as partaking of the nature both of bills of attainder and ex post facto laws. The reason is that such acts impose a punishment without trial; they make that a crime which was not so before; and they change the rules of evidence by shifting the burden of proof upon the person accused.[188] If an extradition treaty is given a retroactive effect, so as to allow of the extradition of a criminal who had taken refuge in this country before the treaty, he cannot object to it on the ground of its being ex post facto.[189]

SUSPENSION OF HABEAS CORPUS.

264. By the constitution of the United States, as well as by the constitutions of nearly all the states, it is provided that the privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.

The writ here referred to is the writ of "habeas corpus ad subjiciendum," which is directed to any person detaining another, and commanding him to produce the body of the prisoner (or person detained) with the day and cause of his caption and detention, to do, submit to, and receive whatsoever the judge or court awarding the writ shall consider in that behalf.[140] This writ, says Story, "is justly esteemed the great bulwark of personal liberty, since it is the appropriate

[187] Hannahan v. State, 7 Tex. App. 664.

[188] Cummings v. Missouri, 4 Wall. 277; Ex parte Garland, Id. 333; Pierce v. Carskadon, 16 Wall. 234.

[189] In re De Giacomo, 12 Blatchf. 391, Fed. Cas. No. 3,747.

[140] 3 Bl. Comm. 131.

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remedy to ascertain whether any person is rightfully in confinement or not, and the cause of his confinement, and if no sufficient ground of detention appears, the party is entitled to his immediate discharge." [141] "In England, the benefit of it was often eluded prior to the reign of Charles the Second, and especially during the reign of Charles the First. These pitiful evasions gave rise to the famous Habeas Corpus Act of 31 Car. II. c. 2, which has been frequently considered as another Magna Charta in that kingdom, and has reduced the general method of proceedings on these writs to the true standard of law and liberty. That statute has been, in substance, incorporated into the jurisprudence of every state in the Union, and the right to it has been secured in most, if not all, of the state constitutions by a provision similar to that existing in the constitution of the United States." [142]

The privilege of the writ is not usually suspended except when martial law has been declared in a particular place or district. The effect of its suspension is to make it possible for military commanders or other officers to cause the arrest and detention of obnoxious or suspected persons, without any regular process of law, and to deprive those persons of the right to an immediate hearing and to be discharged if the cause of their arrest is found to be unwarranted by law.

It seems to be now settled (though not without disputes which are of considerable historical interest) that the power to suspend the writ, under the federal constitution, in the case of rebellion or invasion, is confided to congress alone; that it is the right and duty of that body to judge when the exigency has arisen to justify this step; and that it does not belong to the executive branch of the government either to so judge or to take the responsibility of suspending the writ, unless under an authorization from congress.

DEFINITION OF TREASON.

265. Convictions and punishments for constructive treason are prevented by the definition of treason found in the federal constitution.

[141] 2 Story, Const. § 1339. [142] 2 Story, Const. § 1341.

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266. According to that definition, treason against the United States consists only in levying war against them, or in adhering to their enemies, giving them aid and comfort.

267. There may also be treason against a particular state, defined and punished as a crime by its laws; and the same acts do not necessarily constitute treason against the United States also.

That clause of the federal constitution which defines the crime of treason, and prescribes the proof required to sustain a conviction, was intended as an additional safeguard against tyranny and injustice. It is in the following words: "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." Similar provisions have been adopted in the constitutions of many of the states.

"By the ancient common law, it was left very much to discretion to determine what acts were and were not treason; and the judges of those times, holding office at the pleasure of the crown, became but too often instruments in its hands of foul injustice. At the instance of tyrannical princes, they had abundant opportunities to create constructive treasons; that is, by forced and arbitrary constructions, to raise offenses into the guilt and punishment of treason which were not suspected to be such. The grievance of these constructive treasons was so enormous, and so often weighed down the innocent and the patriotic, that it was found necessary, as early as the reign of Edward III., for parliament to interfere and arrest it, by declaring and defining all the different branches of treason. This statute has ever since remained the pole-star of English jurisprudence on this subject. * * * It was under the influence of these admonitions, furnished by history and human experience, that the convention deemed it necessary to interpose an impassable barrier against arbitrary constructions, either by the courts or by congress, upon the crime of treason." [143]

[143] 2 Story, Const. § 1799.

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To constitute this specific crime, "war must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war and actually to levy war are distinct offenses. The first must be brought into open action by an assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed. The actual enlistment of men to serve against the government does not amount to levying war. It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors." [144]

There may also be treason against a particular state, defined and punished as a crime by its laws. And treason against a state is not necessarily at the same time treason against the United States. Treason may be committed against a state by opposing its laws and forcibly attempting to overturn or usurp the government. And conversely, treason against the United States is not an offense against the laws of a particular state. It is a crime which is exclusively directed against the national government and exclusively cognizable in its courts.[145]

CORRUPTION OF BLOOD AND FORFEITURE.

268. The constitution of the United States provides that "no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted." And the constitutions of nearly all the states provide generally that no conviction shall work corruption of blood

[144] Ex parte Bollman, 4 Cranch, 75, 126. See, also, U. S. v. Hoxie, 1 Paine, 265, Fed. Cas. No. 15,407; U. S. v. Hanway, 2 Wall. Jr. 139, Fed. Cas. No. 15,299; U. S. v. Insurgents, 2 Dall. 335, Fed. Cas. No. 15,443; U. S. v. Mitchell, 2 Dall. 348, Fed. Cas. No. 15,788.

[145] People v. Lynch, 11 Johns. 549; Respublica v. Carlisle, 1 Dall. 35.

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or forfeiture of estates, though in a few, it seems, there may still be a forfeiture during the life of the person convicted.

Soon after the adoption of the federal constitution, congress passed an act declaring that no conviction or judgment, for any capital or other offense, should work corruption of blood or any forfeiture of estate.[146] But in 1861, at the beginning of the civil war, new statutes for the punishment of treason were enacted, and these provided for the confiscation of the property of persons in rebellion against the government. But a question having been made, as to whether the fee in the realty of such persons might not be confiscated, it was expressly provided in the confiscation acts that no punishment or proceedings should be construed to work a forfeiture of the real estate of the offender, longer than for the term of his natural life.[147]

In English law, corruption of blood was the consequence of attainder. It meant that the attainted person could neither inherit lands or other hereditaments from his ancestor, nor retain those he already had, nor transmit them to any heir by descent, because his blood was considered in law to be corrupted. This was abolished by St. 33 & 34 Vict. c. 23, and is unknown in America.

In England, if a person is outlawed for treason, his lands are forfeited to the crown. If he is outlawed for felony, he forfeits to the crown all his goods and chattels, real and personal, and also the profits of his freeholds during his life, and after his death, the crown is entitled to his freeholds for a year and a day, with the right of committing waste. Formerly, a conviction for any kind of felony caused a forfeiture of goods and chattels, both real and personal, but this has been abolished by the St. 33 & 34 Vict. c. 23. This statute provides that no conviction, judgment, or sentence for treason or felony shall work corruption of blood or forfeiture. But it leaves the old law of outlawry for treason and felony, with its consequences, untouched.[148]

[146] Rev. St. U. S. § 5326 (Act April 30, 1790).

[147] See 2 Story, Const. § 1300, note; Bigelow v. Forrest, 9 Wall. 339; Day v. Micon, 18 Wall. 156; Wallach v. Van Riswick, 92 U. S. 202; Fire Department v. Kip, 10 Wend. 266.

[148] See 4 Steph. Comm. (10th Ed.) 477; Williams, Real Prop. 126.

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CHAPTER XXI.

LAWS IMPAIRING THE OBLIGATION OF CONTRACTS.

269. Constitutional Provisions.
270. The Law Impairing the Contract.
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277–281. Charters as Contracts.
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CONSTITUTIONAL PROVISIONS.

269. The federal constitution provides that no state shall pass any law impairing the obligation of contracts. And the constitutions of many of the states impose the same restraint upon their legislatures.

The causes for the introduction of this clause into the constitution of the United States are to be found in the financial condition of the country at the close of the revolutionary war, and the disposition of the states, at that time, with reference to the enforcement of public and private obligations. It was much to be apprehended that they would repudiate their debts, unless restrained by some such provision of the paramount law. There was also a strong desire to issue paper money and make it circulate, even when that involved the discharge of previous contracts in an almost worthless currency. Further, the various states were much inclined to make such liberal provision for the relief and encouragement of the debtor class as would result in great injury and detriment to the class of creditors, and to the serious impairment of public and private credit. The means adopted to check these tendencies was the prohibition upon state action which we are about to consider. That it has been beneficent in its effects cannot be doubted. But it has given rise to an amount of litigation, and has involved the courts in a succession of adjudications, which are not equalled by those growing out

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of any other clause of the constitution, unless it may be that which gives to congress the power to regulate commerce. This prohibition, it will be noticed, is directed only against the states, and there is no other clause in the constitution laying a like inhibition upon congress. It follows, therefore, that if congress should pass a law, falling within the scope of its jurisdiction, and not obnoxious to any other prohibition of the constitution, the courts would be obliged to sustain it, notwithstanding its effect might be to impair the obligation of existing public or private contracts. The injustice of such an act would not be sufficient ground for adjudging it unconstitutional. And in fact, such consequences have attended several of the acts of congress, such as the legal tender law and the various statutes of bankruptcy, but their constitutionality has not been questioned on that ground.[1] But it has been held that the legislature of a territory has no more power to pass a law impairing the obligation of contracts than is possessed by the legislature of a state.[2]

THE LAW IMPAIRING THE CONTRACT.

270. The prohibition against impairing the obligation of contracts applies not only to the ordinary statutes of the state, and the ordinances of its municipalities, but also to any clause in its constitution, or any amendment thereto, which produces the forbidden effect.

A provision in a state constitution, or an amendment thereto, is a "law" within the meaning of this clause. The federal constitution is the supreme law of the land, and its prohibitions upon state action apply just as much to the people of the state, when making or amending their constitution, as to their representatives sitting in the legislature to make ordinary laws. Hence if a constitutional provision or amendment impairs the obligation of contracts, it is void.[3] But the prohibition is directed against the legis-

[1] Hepburn v. Griswold, 8 Wall. 637; Gunn v. Barry, 15 Wall. 610; Mitchell v. Clark, 110 U. S. 633, 4 Sup. Ct. 170, 312; Evans v. Eaton, Pet. C. C. 322, 337, Fed. Cas. No. 4,559; Hopkins v. Jones, 22 Ind. 310.

[2] Morton v. Sharkey, McCahon (Kan.) 535.

[3] New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Manuf'g

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lative action of the state (whether by the legislature or by a constitutional convention) and not against the determinations of its judicial department. The obligation of the contract must have been impaired by some law, that is, some constitutional provision or statute. A judgment of the supreme court of a state will not be reviewed by the supreme court of the United States, on a writ of error, on the ground that the obligation of a contract has been impaired, unless some legislative act or constitutional provision has been sustained by the judgment. It is not enough that the judgment itself decides against the validity of the contract or has the effect to make it different from that which the parties intended.[4] The prohibition against "passing" any law impairing the obligation of contracts equally forbids a state to enforce as a law any enactment of that character, from whatever source originating. Hence an enactment of the "Confederate States," enforced as a law of one of the states composing that confederation, sequestrating a debt owing by one of its citizens to a citizen of a loyal state as an alien enemy, is void for this reason.[5]

THE OBLIGATION.

271. The obligation of a contract is that duty of performing the contract, according to its terms and intent, which the law recognizes and enforces.

For judicial purposes, and in the constitutional sense, the "obligation" of a contract is that duty of performing it which the law recognizes and enforces.[6] "The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced, and by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tends to postpone or retard the enforcement of the

Co., 115 U. S. 650, 6 Sup. Ct. 252; Delmas v. Insurance Co., 14 Wall. 661; Dodge v. Woolsey, 18 How. 331; Gunn v. Barry, 15 Wall. 610.

[4] New Orleans Waterworks Co. v. Louisiana Sugar Refining Co., 125 U. S. 18, 7 Sup. Ct. 741; Railroad Co. v. McClure, 10 Wall. 511.

[5] Williams v. Bruffy, 96 U. S. 176.

[6] Black, Const. Prohib. § 139; Story, Confl. Laws, § 266; Johnson v. Duncan, 3 Mart. (La.) 530.

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contract, the obligation of the latter is to that extent weakened." [7] In illustration of this rule, it is held that a state statute repealing a former law, which made the stock of stockholders in a corporation liable to its debts, is, as respects creditors of the corporation existing at the time of the repeal, a law impairing the obligation of contracts and therefore void.[8]

THE IMPAIRMENT OF THE CONTRACT.

272. A law impairs the obligation of contracts and is void if it—

(a) Precludes a recovery for breach of the contract.

(b) Excuses one of the parties from performing it.

(c) Renders the contract invalid.

(d) Puts new terms into the contract.

(e) Enlarges or abridges the intention of the parties.

(f) Postpones or accelerates the time for performance of the contract.

(g) Interposes such obstacles to its enforcement as practically to annul it.

Any statute is unconstitutional, as impairing the obligation of contracts, which introduces a change into the express terms of the contract, or its legal construction, or its validity, or its discharge, or (within certain limits to be presently noticed) the remedy for its enforcement. The extent of the change is not material; any impairment of the contract is unlawful. "This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force." [9]

WHAT CONTRACTS ARE PROTECTED.

273. The "contracts" intended to be secured by this clause of the constitution are all such as might be injuriously affected by the legislative action of the state if not thus protected.

[7] Louisiana v. New Orleans, 102 U. S. 203.

[8] Hawthorne v. Calef, 2 Wall. 10; Ochiltree v. Railroad Co., 21 Wall. 249.

[9] Planters' Bank v. Sharp, 6 How. 301, 327.

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274. State legislatures are thus prohibited from impairing the obligation of—

(a) Agreements or compacts of the state with another state.

(b) Contracts of the state with corporations or individuals.

(c) Grants of property or franchises by the state.

(d) Contracts between private persons.

275. The contracts thus protected from impairment by the constitution do not include—

(a) Statutory grants of mere licenses or exemptions.

(b) The tenure of public offices.

(c) Illegal or immoral contracts.

(d) Judgments of the courts.

(e) The status created by marriage.

The protection furnished by this clause extends not only to such contracts as remain executory, but also to such as have been fully executed. And it includes such contracts as the law implies from the relations or dealings of the parties, as well as those which they have put into express terms.[10]

Contracts between States.

Agreements or compacts between two states of the Union, such as they are authorized to make with the consent of congress, are secured against impairment by this clause of the constitution, and any person who is injured by a legislative action of either state, amounting to a violation of the agreement, has a standing to complain of its unconstitutionality.[11]

Statutes.

A statute may contain a contract, or the offer of a contract, or be the evidence of a contract, or be essential to the obligation of a contract made on the faith of its continuance in force; but a statute is not a contract purely and solely per se. The mere enactment of a law on any subject does not amount to a contract between the legislature and the people that such law shall remain in force, nor does it abridge

[10] Holmes v. Holmes, 4 Barb. 295. [11] Green v. Biddle, 8 Wheat. 1.

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the power of the legislature to amend or repeal it. The case is different if the act makes a grant or an engagement of the state, or provides remedies which enter into the composition of future contracts.

Contracts of a State with Individuals.

The bonds or other evidences of debt issued by a state or municipality are in the nature of contracts with the lawful holders thereof. And this contract includes such provisions of law, with regard to the receivability of the bonds or coupons for taxes, or the exemption of the securities from taxation, as existed when they came into the hands of the holders, and were intended to promote their credit or their circulation. Thus, when such public securities are held by non-residents, who are not subject to taxation by the state, a subsequent statute taxing the securities and directing that the amount of the tax shall be deducted from the stipulated periodical payments, impairs the obligation of the contract and is void.[17] The same principle governed the celebrated "Virginia coupon cases," which were long and earnestly contested in the supreme court, but resulted in holding the state firmly to the agreement which it had made with its creditors. This litigation grew out of the funding act of 1871, in that state, which provided that the coupons on the bonds then issued should be receivable in payment of all taxes and debts to the state. This privilege the legislature afterwards attempted to rescind, on the ground of frauds in the manipulation of the securities. But it was held that the contract made with the holders of the securities could not be thus impaired, and that the state must abide by its original agreement.[18] And generally speaking, when a state enters into a contract with a private person, for the construction of public works, the furnishing of public supplies, or any other sort of business engagement, it incurs a binding obligation which the legislature may not lawfully abrogate or impair. "The state," says the New York court of appeals, "in all its contracts and dealings with individuals, must be adjudged and abide by the rules which govern in determining the rights of private citizens contracting and dealing with each other.

[17] State Tax on Foreign-Held Bonds, 15 Wall. 300; Murray v. Charleston, 96 U. S. 432.

[18] Antoni v. Greenhow, 107 U. S. 769, 2 Sup. Ct. 91; Virginia Coupon Cases, 114 U. S. 270, 5 Sup. Ct. 903–923; McGahey v. Virginia, 135 U. S. 662, 10 Sup. Ct. 972.

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There is not one law for the sovereign and another for the subject; but when the sovereign engages in business and the conduct of business enterprises, and contracts with individuals, although an action may not lie against the sovereign for a breach of the contract, whenever the contract in any form comes before the courts the rights and obligations of the contracting parties must be adjusted upon the same principles as if both contracting parties were private persons. Both stand upon equality before the law, and the sovereign is merged in the dealer, contractor, and suitor." [14]

A law of the state offering a bounty for any particular kind of services to be rendered is an offer of a contract to any person who will accept its terms. But a contract of this sort does not become complete and binding until it is accepted by an individual and the work begun or the services rendered. Until that is done, the mere offer on the part of the state may be withdrawn; but not so after it has been acted on in a specific instance.[15] On the same principle, a grant of a penalty, or of a share in a forfeiture, to any person who will give information and sue for it, may be considered in the nature of a contract by the state. But such penalties and forfeitures may be released by statute at any time before an actual recovery has been had.[16] But a mere gratuitous concession on the part of the state, not founded upon any consideration or advantage moving to it, does not amount to a contract.[17]

Grants by a State.

Grants of property or franchises, made by a state to a private person or corporation, are contracts within the meaning of this clause of the constitution. Thus, at an early day, the state of Georgia sold to certain individuals a tract of the public lands, received the purchase money, and issued a patent. Afterwards it was alleged that the sale had been procured by fraud and misrepresentation on the part of the purchasers, and a statute was passed annulling the grant, setting aside the patent, and authorizing the sale of the same land to other

[14] People v. Stephens, 71 N. Y. 527, 549. And see Danolds v. State, 89 N. Y. 36; Carr v. State, 127 Ind. 204, 26 N. E. 778.

[15] Welch v. Cook, 97 U. S. 541.

[16] Confiscation Cases, 7 Wall. 454; U. S. v. Tynen, 11 Wall. 88.

[17] Wheeling & Belmont Bridge Co. v. Wheeling Bridge Co., 138 U. S. 287, 11 Sup. Ct. 301.

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persons. It was held that this statute impaired the obligation of the contract made with the first purchasers, and was void.[18]

Grants of Exclusive Privileges.

The legislature of a state, if the public interests may seem to make it desirable, may grant to a person or corporation a monopoly or exclusive franchise or privilege, and the grant may assume the form of a contract, the obligation of which must not thereafter be impaired. But monopolies are not favored in law, and grants of this kind are subject to the following four limitations:

(1) The grant is to be construed strictly against the grantee and in favor of the public. Nothing will pass by implication, and the extent of the privileges granted will not be enlarged by inference or construction. Thus, the grant will not be understood to prevent the legislature from according rival or competing franchises to other persons, unless its plain terms convey that meaning.[19]

(2) The intention to grant a monopoly will never be presumed, but on the contrary it will be presumed that the legislature did not intend thus to limit its own power or that of its successors. And this presumption can be overcome only by clear and satisfactory inferences from the terms of the grant.[20]

(3) The rights or franchises granted may be revoked or annulled by the state, in the exercise of the power of eminent domain, or their value may be impaired by the grant of similar privileges to others. But in this case, due compensation must be made.[21]

(4) The owner of the privilege or franchise may be regulated in the use of his property and the enjoyment of the privilege, by all such laws and ordinances as are established in the lawful exercise of the police power, even though its value may be thereby impaired, or the exclusive features of the grant be infringed.

To illustrate these rules, we may refer to a case wherein it was held that a legislative grant of an exclusive right to supply water to a mu-

[18] Fletcher v. Peck, 6 Cranch, 87.

[19] Charles River Bridge v. Warren Bridge, 11 Pet. 420; Turnpike Co. v. Maryland, 3 Wall. 210.

[20] City of Detroit v. Detroit & H. P. R. Co., 43 Mich. 140, 5 N. W. 275.

[21] Richmond, F., & P. R. Co. v. Louisa R. Co., 13 How. 71; Enfield Toll Bridge Co. v. Hartford & N. H. R. Co., 17 Conn. 40; West River Bridge Co. v. Dix, 6 How. 507; Binghamton Bridge Case, 3 Wall. 51.

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nicipality and its inhabitants, through pipes and mains laid in the public streets, and upon condition of the performance of the service by the grantee, is a grant of a franchise vested in the state, in consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the federal constitution against state legislation, and against provisions in state constitutions, to impair it.[22]

Licenses and Exemptions.

A license is a permission granted to an individual to do some act or engage in some occupation which, without such permission, would be unlawful. A license is not a contract. For instance, a license to sell liquor at retail may be revoked, or rendered nugatory by a change in the law of the state, or subjected to the payment of a heavier fee, or hedged about with more severe restrictions, before the expiration of the term for which it was granted. And in all this there is no impairment of contract obligations.[23] So a license to maintain a lottery is a mere privilege, revocable at will, and not a contract, even though founded on a consideration.[24] And a permission granted to a foreign insurance company to do business within the state, upon complying with certain conditions, does not raise a contract between the state and the company, when it complies with the requirements, in any such sense as will prevent the state from afterwards imposing an annual license tax upon it for the same privilege.[25] And, in general, a right which is derived from the exercise of legislative authority is as much within the power

[22] St. Tammany Waterworks Co. v. New Orleans Waterworks, 120 U. S. 64, 7 Sup. Ct. 405. But a contract with a municipal corporation, whereby the corporation grants to the contractor the sole privilege of supplying the municipality with water from a designated source for a term of years, is not impaired, within the meaning of this clause of the constitution, by a grant to another party of a privilege to supply it with water from a different source. Stein v. Bienville Water Supply Co., 141 U. S. 67, 11 Sup. Ct. 892. See, also, Hamilton Gaslight & Coke Co. v. Hamilton City, 146 U. S. 258, 13 Sup. Ct. 90.

[23] Calder v. Kurby, 5 Gray, 597; Fell v. State, 42 Md. 71; Metropolitan Board of Excise v. Barrie, 34 N. Y. 659; Moore v. Indianapolis, 120 Ind. 483, 22 N. E. 424.

[24] Stone v. Mississippi, 101 U. S. 814; Boyd v. Alabama, 94 U. S. 645.

[25] Home Ins. Co. v. City Council of Augusta, 93 U. S. 116.

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of that body afterwards to change, modify, or abrogate as it was in the first instance to enact it.[26] Thus, "the duty of serving on juries, like the duty of bearing arms in the defense of the government, is one of the inseparable incidents of citizenship, and can be exacted whenever and however the sovereign authority shall command. All exemptions of this kind are mere gratuities to the citizen, which cannot be the subject of contract between men and the state, and may be withdrawn at the pleasure of the law-making power." And, consequently, the right of exemption from jury service ceases, when the law granting it is repealed, even in the case of those persons who, by the performance of specified services, have earned an exemption under its provisions.[27] On the same principle, a statute exempting the employés of certain railroads from the duty of working on the public roads gives an immunity to such employés, but not in the nature of an irrevocable contract; the legislature may, in its discretion, repeal the exemption and impose the duty.[28] And again, a husband has no vested right in homestead exemption statutes, and the legislature may, by altering or repealing them, at any time change the method of alienation.[29]

Offices.

The election or appointment of a public officer, and his acceptance of the office, do not constitute a contract between the state or municipality and himself. Such an officer is a public agent or trustee, but he does not hold his office by virtue of any contract. The constitution may protect him in his office or his compensation, and if so, he is beyond legislative interference. But so far as concerns the clause we are now considering, it is entirely competent for the legislature to abolish the office, remove the incumbent, change the scope of his jurisdiction or duties, or reduce or alter his salary, emoluments, or fees, and this without impairing any contract which the constitution protects.[30] Public office "has in it no element of

[26] People v. French, 10 Abb. N. C. (N. Y.) 418.

[27] In re Scranton, 74 Ill. 161; Bragg v. People, 78 Ill. 328; In re Powell, 5 Mo. App. 220; Dunlap v. State, 76 Ala. 460. But compare Ex parte Goodin, 67 Mo. 637.

[28] Ex parte Thompson, 20 Fla. 887.

[29] Massey v. Womble, 69 Miss. 347, 11 South. 188.

[30] Butler v. Pennsylvania, 10 How. 402; Love v. Mayor, etc., 40 N. J. Law,

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property; it is not alienable or inheritable; it is a personal public trust, created for the benefit of the state, and not for the benefit of the individual who may happen to be its incumbent." [31] The prospective salary or other emoluments of a public office are not property in any sense, and may be increased, reduced, or regulated by law at all times, except in cases where the constitution expressly forbids it. The right to the compensation grows out of the rendition of services, and not out of any contract between the government and the officer that the services shall be rendered by him.[32] But when services have been rendered by a public officer, under a statute or ordinance which fixes his compensation therefor, there arises an implied contract to pay for such services at that rate, and hence a law fixing a different or less compensation for such past services would impair the obligation of the contract and be unconstitutional.[33]

Illegal and Immoral Contracts.

If the consideration on which a contract is based is illegal, contrary to public policy, or immoral, it has no legal obligation entitled to protection and respect.[34] But if the consideration was recognized as lawful and sufficient, at the time the contract was made, it must not be impaired by subsequent legislation, even though changes in the law or public sentiment have now branded the consideration as illegal or immoral. It was on this ground that the courts declared against the validity of statutes prohibiting recovery on contracts for the sale of slaves, passed after emancipation, so far as regards contracts entered into when slavery was a recognized lawful institution.[35] If a contract entered into by a municipal corporation was void, because ultra vires, a subsequent statute of the state, inconsistent with it, cannot be said to impair its obligation.[36]

456; Barker v. City of Pittsburgh, 4 Pa. St. 49; Com. v. Weir, 165 Pa. St. 284, 30 Atl. 835; State v. Hermann, 11 Mo. App. 43; Bryan v. Cattell, 15 Iowa, 538; Farwell v. City of Rockland, 62 Me. 296.

[31] Ex parte Lambert, 52 Ala. 79.

[32] Conner v. Mayor, etc., 5 N. Y. 285; Smith v. Mayor, etc., 37 N. Y. 518.

[33] Fisk v. Police Jury, 116 U. S. 131, 6 Sup. Ct. 329.

[34] 2 Kent, Comm. 466; Bishop, Cont. § 467 et seq.; Meacham v. Dow, 32 Vt. 721; Marshall v. Baltimore & O. R. Co., 16 How. 314; Platt v. People, 29 Ill. 54.

[35] White v. Hart, 13 Wall. 646.

[36] New Orleans v. New Orleans Waterworks, 142 U. S. 79, 12 Sup. Ct. 142.

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Judgments.

A judgment is not a contract within the meaning of this prohibitory clause. There are some few cases in which it has been held that the clause might be made to include the ordinary judgments of the courts, but they proceeded upon a misapprehension of the constitutional principle. It is true that statutes have been declared invalid, as obnoxious to this inhibition, which vacated judgments, granted new trials, enacted shorter statutes of limitation, exempted the debtor's property, gave stay of execution, and so on. But it was not because they attacked the judgment, but because they destroyed or desiccated the remedy on the original contract, which, as we shall see, is vital to the maintenance of its obligation. And if the cause of action was in tort, it is very evident that the constitutional clause does not apply.[87]

Marriage.

Marriage is not a contract within the meaning of this clause. While it includes some contractual elements, it is much more than a contract, since it is to be regarded as an institution of society, and as establishing a status of the married parties which is not dissoluble at their pleasure. Consequently, a divorce, whether granted directly by the legislature, or by the courts under the authorization of a general law, cannot be said to impair the obligation of a contract.[88]

LIMITATIONS ON POWER OF LEGISLATURE TO CONTRACT.

276. The power of a state legislature, in making contracts with individuals or corporations, is limited by the rule that it is not competent to relinquish any of the essential powers of sovereignty by an irrevocable bargain

[87] Garrison v. City of New York, 21 Wall. 196; Louisiana v. Mayor of New Orleans, 109 U. S. 285, 3 Sup. Ct. 211; Freeland v. Williams, 131 U. S. 405, 9 Sup. Ct. 763; Nelson v. St. Martin's Parish, 111 U. S. 716, 4 Sup. Ct. 648; McAfee v. Covington, 71 Ga. 272; Morley v. Lake Shore & M. S. R. Co., 146 U. S. 162, 13 Sup. Ct. 54.

[88] Cronise v. Cronise, 54 Pa. St. 255; Maguire v. Maguire, 7 Dana, 181; Carson v. Carson, 40 Miss. 349; Maynard v. Hill, 125 U. S. 190, 8 Sup. Ct. 723.

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or grant. Hence if any statute is passed in the exercise of the police power or the power of eminent domain, it cannot be objected to it that it violates the obligation of prior legislative contracts, because such contracts will never be understood as involving a surrender of these powers, or, if they do, they are to that extent beyond the legislative power and void.

The rule just stated is of the utmost importance, and cannot be too strongly commended to the reader's attention. It is obvious that if it were in the power of any state legislature to fetter the hands of its successors by bargaining away the essential powers of sovereignty, government would pass from its legitimate repositories into private hands. All legislative grants and contracts are therefore to be taken subject to this limitation, that they do not involve any surrender of these high powers, in any such sense that the same or a succeeding legislature may not exercise them, though it be to the detriment of rights or privileges secured by contract. All property, for instance, and all rights and franchises, whether derived from legislative grant, charter, or otherwise, are held subject to lawful police regulations. This principle is more fully developed in the chapter specially relating to that subject. So also, franchises granted to corporations, or property or rights granted to individuals, may be resumed by the state in the exercise of the power of eminent domain. And no objection thereto can be based on the contract clause of the constitution, because these are powers inalienable by the legislature.[89] But, as we shall presently see, the legislature may relinquish the power of taxation, with respect to particular property, either for a limited time or in perpetuity, by an explicit contract founded upon a consideration.

[89] See Stone v. Mississippi, 101 U. S. 814; Beer Co. v. Massachusetts, 97 U. S. 25; New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Manuf'g Co., 115 U. S. 650, 6 Sup. Ct. 252; Reynolds v. Geary, 26 Conn. 179; West River Bridge Co. v. Dix, 6 How. 507.

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CHARTERS AS CONTRACTS.

277. The charter of a private corporation is a contract between the legislature granting it and the corporation; and it cannot be repealed, altered, or materially modified by the legislature without the consent of the corporation.

278. Corporate charters, considered as contracts exempt from legislative control, are construed strictly against the corporators.

279. The charter of a corporation may be repealed, altered or amended by the legislature if power to do so has been reserved in the charter itself or in a constitution or statute subject to which the charter was taken.

280. The franchises of a corporation may be resumed by the state in the exercise of the power of eminent domain; and their use and exercise may be regulated under the police power.

281. The charter of a municipal corporation is not a contract.

The doctrine that the charter of a private corporation is to be considered as a contract between the state and the corporation was first established in the celebrated case of Dartmouth College v. Woodward,[40] wherein it appeared that the legislature of New Hampshire had undertaken to make certain radical changes in the government of the college, contrary to its charter and without its consent. It was decided that the charter was a contract, that it was based upon a supposed consideration of public services or public benefits, that it protected the corporation in the enjoyment of all its charter rights, privileges, and franchises against legislative interference, and that the act of the legislature of New Hampshire was void as impairing the obligation of this contract. It was soon seen that this doctrine was applicable to business and manufacturing companies, and in fact to every species of private corpora-

[40] 4 Wheat. 518. And see Planters' Bank v. Sharp, 6 How. 301; Binghamton Bridge Case, 3 Wall. 51; Farrington v. Tennessee, 95 U. S. 679.

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tions holding their charters under legislative grant or general law. The protection afforded them by the doctrine of this case is usually assigned as the cause of the enormous influence and power of corporations in modern business and industrial life, and many efforts have been made to escape from its sway. The Dartmouth College Case has often been assailed with the severest criticism. And indeed it is probable that the decision, though it was right enough on the particular facts, set up a general rule which is indefensible in law. Yet it has never been directly overruled, and it still stands as the leading authority on this branch of the subject. But the courts have been careful to restrict the doctrine to the narrowest possible bounds, and the legislatures of the states have generally seen the wisdom of retaining control over the franchises or powers of new corporations.

So far as regards exemption from legislative control, charters of incorporation are to be construed strictly against the corporators.[41] A charter will not be held to grant a monopoly, for instance, unless the plain language requires that interpretation. Where a corporation, by its charter, is given the right to "take" property for the construction of its works, upon making just compensation, this does not constitute a contract with the state such as to prevent the legislature from afterwards enacting that the company shall be liable for indirect or consequential injuries to the property of private persons caused by its constructions or operations.[42] It should also be noticed that a statutory provision, merely authorizing the formation of a corporation in the future, cannot become a contract, in any such sense as to be protected by the federal constitution, until it has become vested as a right by an actual organization under it, and then it takes effect as of that date, and subject to such laws as may then be in force.[43] Moreover, rights or privileges granted to corporations by statute, after their incorporation, do not constitute any part of the contract embodied in the charter, and consequently they may be revoked or modified by the legislature at will, unless the statute itself amounts to a charter.[44] And where two

[41] Perrine v. Chesapeake & Delaware Canal Co., 9 How. 172; Georgia R. Co. v. Smith, 128 U. S. 174, 9 Sup. Ct. 47.

[42] Pennsylvania R. Co. v. Miller, 132 U. S. 75, 10 Sup. Ct. 34.

[43] People v. Cook, 148 U. S. 397, 13 Sup. Ct. 645.

[44] South Carolina v. Gaillard, 101 U. S. 433.

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corporations are consolidated, under a state statute which has the effect of dissolving both of them and creating a new corporation, the charter of the new company may be subject to alteration or amendment by the legislature, although those of the old companies were not so liable.[45]

In granting a charter of incorporation, the state may reserve the right to repeal, alter, or amend it. And when this is done, the repeal or amendment of the charter is no impairment of the contract which it embodies, but is rather the enforcement of one of its terms. This power may be reserved in the particular charter itself; but it is equally effective if the state constitution or a statute, in force when the charter is granted, reserves to the legislature the right to revoke or modify it. In the latter case, the reservation becomes a part of the contract.[46] But the exercise of this power must be reasonable, and must have relation to the original nature and scope of the charter. It cannot be employed as a means of forcing the corporation into enterprises not contemplated by the charter, nor to deprive the corporators of their property, nor to abridge the lawful rights of the stockholders.[47]

Rights, privileges, or franchises granted to a corporation by its charter may be resumed by the state, when the exigencies of the public require it, under the power of eminent domain, upon the payment of due compensation.[48]

And notwithstanding the protection afforded to charter rights and privileges by the doctrine under consideration, a corporation, like any individual, is subject to regulation, by legislative authority, to the end that the use of its franchises or property may not endanger the public health, safety, or comfort, or be made the means of oppression or fraud. That is, it is subject to regulation under the police power. This subject has been considered in an earlier chapter.[49]

[45] Shields v. Ohio, 95 U. S. 319.

[46] Chesapeake & O. Ry. Co. v. Miller, 114 U. S. 176, 5 Sup. Ct. 818; Stone v. Wisconsin, 94 U. S. 181; Suydam v. Moore, 8 Barb. (N. Y.) 358.

[47] New York & N. E. R. Co. v. Town of Bristol, 151 U. S. 556, 14 Sup. Ct. 437.

[48] West River Bridge Co. v. Dix, 6 How. 507.

[49] See ante, p. 334. And see Beer Co. v. Massachusetts, 97 U. S. 25; Munn

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Charters of Municipal Corporations.

The charter of a municipal corporation is not a contract within the meaning of this clause of the constitution. It is a grant or delegation of governmental powers, for public purposes, to a subordinate agency of government. All rights, powers, privileges, and franchises granted to such corporations are held subject to legislative modification or recall. And therefore a statute revoking or changing the public powers or rights of a municipality, altering its boundaries, or modifying its government, does not impair the obligation of any contract.[50] And on the same principle, legislative grants to municipal corporations, which do not pertain to the functions of government, but to the convenience or business advantages of the community, are not protected from subsequent revocation by this constitutional provision, as they would be if granted to private persons or corporations. The charters of some of our most ancient cities were granted by the crown of Great Britain before the separation of the colonies. But this circumstance gives them no peculiar sanctity. They are as much under the control of the legislature of the state as are municipal charters granted by that legislature itself.[51]

EXEMPTION FROM TAXATION.

282. A legislative grant of exemption from taxation will constitute a contract with the grantee which cannot be impaired by subsequent legislative action.

283. But such a contract of exemption—

(a) Must be made out by clear and unambiguous terms, and cannot be presumed; and

(b) Must be founded on a consideration moving to the public.

v. Illinois, 94 U. S. 113; New Orleans Gas-Light Co. v. Louisiana Light & Heat Producing & Manuf'g Co., 115 U. S. 650, 6 Sup. Ct. 252; Stone v. Farmers' Loan & Trust Co., 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191.

[50] Dartmouth College v. Woodward, 4 Wheat. 518; Crook v. People, 106 Ill. 237; Demarest v. Mayor, etc., of New York, 74 N. Y. 161; Philadelphia v. Fox, 64 Pa. St. 169; Town of Marietta v. Fearing, 4 Ohio, 427.

[51] Demarest v. Mayor, etc., of New York, 74 N. Y. 161.

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It is well settled that the legislature of a state may agree, by an explicit grant founded upon a consideration, to exempt specified property from taxation, either for a limited period or indefinitely, or that taxation of the property in question shall be had only on a certain basis, and not otherwise, or shall not exceed a certain rate; and this will constitute a contract with the grantee which succeeding legislatures may not impair by imposing taxes contrary to the grant.[52]

But a contract to exempt property from taxation will never be presumed. On the contrary, the presumption is always strongly against the intention of the legislature to surrender this important power, or to restrict or limit it in any way. All doubts will be resolved against the exemption claimed. Nothing but the clearest and plainest terms, manifesting such an intention, will be sufficient to establish a contract relieving property from its due share of the public burdens.[53] And furthermore, a grant of this special privilege must be founded upon a consideration, such as the imposition of some further burden or public duty upon the recipient of the grant, or the payment of a bonus or commutation to the state, or the surrender of some right or franchise previously held. If there is no such consideration, the grant of exemption is a mere act of grace or favor and is revocable at will.[54] And if it appears that the exemption was made without any consideration moving to the public, as is usually the case with the exemption of the property of religious societies and charitable institutions, then there is nothing to prevent its repeal at any time, for there is no contract to stand in the way.[55]

[52] New Jersey v. Wilson, 7 Cranch, 164; Pacific R. Co. v. Maguire, 20 Wall. 36; Northwestern University v. People, 99 U. S. 309; New Jersey v. Yard, 95 U. S. 104; Gordon v. Appeal Tax Court, 3 How. 133; Farrington v. Tennessee, 95 U. S. 679; Piqua Branch of Bank of Ohio v. Knoop, 16 How. 369; Wilmington R. Co. v. Reid, 13 Wall. 264; New Orleans v. Houston, 119 U. S. 265, 7 Sup. Ct. 198; Yazoo & M. V. R. Co. v. Thomas, 132 U. S. 174, 10 Sup. Ct. 68.

[53] Gilman v. City of Sheboygan, 2 Black (U. S.) 510; Providence Bank v. Billings, 4 Pet. 514; Delaware Railroad Tax, 18 Wall. 206.

[54] Rector, etc., of Christ Church v. Philadelphia Co., 24 How. 300; Home of the Friendless v. Rouse, 8 Wall. 430; Tucker v. Ferguson, 22 Wall. 527.

[55] East Saginaw v. East Saginaw Salt Co., 18 Wall. 373; Home Ins. Co. v. City Council, 93 U. S. 116; In re Mayor, etc., of New York, 11 Johns. 77; Broadway Baptist Church v. McAtee, 8 Bush, 508.

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LAWS AFFECTING REMEDIES ON CONTRACTS.

284. There is a distinction between the obligation of a contract and the remedy for its enforcement. Whatever pertains merely to the remedy may be changed or modified, at the discretion of the legislature, without impairing the obligation of the contract, provided the remedy be not wholly taken away nor so hampered or reduced in effectiveness as to render the contract practically incapable of enforcement.

The remedy cannot be wholly abolished or denied to the parties. For to withdraw all legal means of enforcing a contract, or obtaining satisfaction for a breach of its terms, is to withdraw that sanction of the law which constitutes a part of the obligation of the contract. The state is bound to provide a remedy for such cases. But it is not of the obligation of the contract that the remedy shall remain the same as it was when the contract was made.[56] But if the parties to a contract include in it, in express terms, the remedy to be sought upon its breach, or the means to be used for securing its performance, subsequent legislation changing the remedial process they have agreed upon is, as to them, inoperative. Thus, for example, where a deed of trust in the nature of a mortgage contains the agreement of the parties as to the time and manner of its foreclosure by public sale, it cannot be made subject to the provisions of a statute afterwards passed, regulating such sales, which makes material changes as to the method of foreclosure or the right of the parties thereunder.[57] A statute taking away the right to use the process of garnishment, except in cases where the creditor will swear that the debt was for food or house rent, cannot be applied to debts contracted before its passage and where exemptions were waived.[58]

[56] Gantly's Lessee v. Ewing, 3 How. 707; Antoni v. Greenhow, 107 U. S. 769, 2 Sup. Ct. 91. The exercise by the state of the power to repeal a grant of authority to its courts to audit claims against the state does not violate the obligation of contracts entered into by the state at a time when the power existed. Baltzer v. North Carolina, 161 U. S. 240, 16 Sup. Ct. 500.

[57] International Bldg. & Loan Ass'n v. Hardy, 86 Tex. 610, 26 S. W. 497.

[58] Adams v. Green, 100 Ala. 218, 14 South. 54.

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But the repeal of a usury law, operating retrospectively upon contracts previously made, and which, at the time, would have been voidable for usury, cannot be said to impair their obligation.[59]

Bankruptcy or insolvency laws may be passed by the states, authorizing the discharge of debtors from their obligations and liabilities on just and reasonable terms. But these laws are subject to three important limitations. First, there must be no national bankrupt law in existence at the time, for such a law suspends all state laws on the same subject while it continues in force. Second, state laws of this kind cannot apply to citizens of other states having claims against the debtor, for the state has no jurisdiction over them. Third, such laws cannot apply to contracts entered into before their enactment, for that would impair their obligation.[60]

The legislature may enact new or different statutes of limitation, prescribing the period within which actions on contracts must be brought, and may make them applicable to existing contracts, provided the remedy of the creditor is not thereby taken away or unreasonably restricted. That is to say, a statute of limitations cutting off all remedy on a particular contract, by prescribing a period which, as to that contract, had already expired, would be unconstitutional. But if it leaves a reasonable time to the creditor to begin his proceedings, he cannot complain, although the time is less than it would have been if the former statute had remained in force.[61]

A law granting exemptions from execution where none before existed, or increasing the exemption already granted, may apply to the enforcement of contracts made before its enactment if the increase of the exemption is not unreasonable. But if it is so great as to make the creditor's remedy of no value, or seriously to impair his prospect

[59] Ewell v. Daggs, 108 U. S. 143, 2 Sup. Ct. 408.

[60] Ogden v. Saunders, 12 Wheat. 213; Baldwin v. Hale, 1 Wall. 223. These limitations on state insolvent laws constitute the difference between their effectiveness and that of an act of congress. And it cannot be doubted that if congress were restrained, as the states are, from passing laws impairing the obligation of contracts, the value to trade and commerce of a national bankrupt law would be almost minimized, for, in that case, it would be restricted, as state laws are, to future contracts.

[61] Bell v. Morrison, 1 Pet. 351; Sturges v. Crowninshield, 4 Wheat. 122; Mitchell v. Clark, 110 U. S. 633, 4 Sup. Ct. 170, 312; Vance v. Vance, 108 U. S. 514, 2 Sup. Ct. 854; Osborn v. Jaines, 17 Wis. 573.

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of making a collection, then it interferes with the obligation of such contracts, and, as to them, is invalid.[62] For instance, a statute providing that the proceeds of life-insurance policies shall not be liable for the debts of the decedent would be void as to debts already contracted.[63]

The "betterment acts," allowing to defendants in ejectment the present value of improvements made by them upon the land in good faith, deducting the amount reasonably due for use and occupation, do not impair the obligation of contracts.[64] But a statute which undertakes to make a lien for seed grain superior to the lien of a mortgage executed before the statute was enacted is repugnant to this clause of the constitution, and therefore void.[65]

A statute providing that property shall not be sold on execution or foreclosure of a mortgage, unless it will bring one-half or two-thirds of the value put upon it by appraisers, is invalid in respect to contracts made before its passage which could have been enforced, by the law at the time they were made, by a judgment and the seizure and sale of property to satisfy it. For such a law, though professing to act only on the remedy, really withdraws from the creditor the effective means of enforcing it upon the basis of which he may be supposed to have made the contract.[66]

A statute giving the right to redeem from mortgage foreclosure sales, or from sales on execution or other judicial process, where no such right before existed, or where such right was expressly waived, or extending the time allowed therefor, cannot constitutionally apply to existing mortgage contracts or to sales made before its passage.[67] But a statute which reduces the rate of interest which redemptioners from mortgage foreclosure sales are required

[62] Edwards v. Kearzey, 96 U. S. 595; Foster v. Byrne, 76 Iowa, 295, 35 N. W. 513; Willard v. Sturm (Iowa) 65 N. W. 847; Dunn v. Stevens (Minn.) 64 N. W. 924; Patton v. City of Asheville, 109 N. C. 685, 14 S. E. 92; Penrose v. Erie Canal Co., 56 Pa. St. 46.

[63] Rice v. Smith, 72 Miss. 42, 16 South. 417; In re Heilbron's Estate, 14 Wash. 536, 45 Pac. 153.

[64] Griswold v. Bragg, 48 Fed. 519.

[65] Yeatman v. Foster Co., 2 N. D. 421, 51 N. W. 721.

[66] McCracken v. Hayward, 2 How. 608; Gantly's Lessee v. Ewing, 3 How. 707.

[67] Barnitz v. Beverly, 163 U. S. 118, 16 Sup. Ct. 1042; Watkins v. Glenn,

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to pay to 8 per cent. is not a violation of the obligation of a contract as to a mortgagee whose mortgage was executed at a time when redemptioners were required to pay 10 per cent. interest. The reason is that such a statute does not diminish the duty of the mortgagor to pay what he agreed to pay, nor shorten the period of payment, nor affect any remedy which the mortgagee had, by existing law, for the enforcement of his contract.[68]

The legislature cannot constitutionally deprive municipal corporations of the power of taxation, in such a manner or to such an extent as to leave them without the means of raising money for the payment of existing debts, which were contracted at a time when they possessed the power to levy taxes and on the faith of the continuance of such power. To do so would be to impair the obligation of the contracts out of which the debts arose, by abolishing the means of their enforcement.[69] Thus, when municipal bonds are taken by the holders on the faith of a promise to levy an annual tax to pay the interest on them, this constitutes a part of the contract; and the municipality cannot lawfully be deprived of the power to levy such taxes.[70]

55 Kan. 417, 40 Pac. 816; Hull v. State, 29 Fla. 79, 11 South. 97; State v. Fylpaa, 3 S. D. 586, 54 N. W. 599.

[68] Connecticut Mut. Life Ins. Co. v. Cushman, 108 U. S. 51, 2 Sup. Ct. 236; Robertson v. Van Cleave, 129 Ind. 217, 26 N. E. 899.

[69] Von Hoffman v. City of Quincy, 4 Wall. 535; In re Copenhaver, 54 Fed. 660; McCless v. Meekins, 117 N. C. 84, 23 S. E. 99.

[70] Louisiana v. Pilsbury, 105 U. S. 278; Mobile v. Watson, 116 U. S. 289, 6 Sup. Ct. 398.

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CHAPTER XXII.

RETROACTIVE LAWS.

285. Validity of Retroactive Statutes.
286. Retroactive Effect Avoided by Construction.
287. Curative Statutes.
288. Statutes Curing Administrative Action.
289. Curing Defective Judicial Proceedings.

VALIDITY OF RETROACTIVE STATUTES.

285. Retroactive laws are not unconstitutional, unless they are in the nature of ex post facto laws or bills of attainder, or unless they impair the obligation of contracts, or divest vested rights, or unless they are specifically forbidden by the constitution of the particular state.

A retroactive (or retrospective) law is one which looks backward or contemplates the past; one which is made to affect acts or transactions occurring before it came into effect, or rights already accrued, and which imparts to them characteristics, or ascribes to them effects, which were not inherent in their nature in the contemplation of the law as it stood at the time of their occurrence. Bills of attainder and ex post facto laws are both included in this class. A bill of attainder or an ex post facto law is always retroactive; but not all retroactive laws are bills of attainder or ex post facto laws. The latter terms, as we have already seen, relate only to the imposition of pains or penalties or the conduct of criminal trials. Again, all laws which impair the obligations of contracts are retroactive. For if they related only to future contracts, they could not be said to have this effect, because contracts are made with reference to existing laws. Laws which have the effect of divesting vested rights are also of this character; for the phrase "vested right" implies something settled or accrued in the past, on which the new statute is to operate. There are also numerous classes of retroactive laws which are constitutionally objectionable for the reason that they exceed the powers of the legislature or

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invade the province of one of the other departments of the government. But unless the law in question belongs to one of the classes mentioned above, or is open to some one of the objections described, the mere fact that it is retroactive in its operation will not suffice to justify the courts in declaring it unconstitutional, unless all laws of that character are prohibited by the constitution of the state. No such prohibition is found in the federal constitution. If a state statute does not impair the obligation of contracts or partake of the nature of a bill of attainder or an ex post facto law, its retrospective character does not make it inconsistent with the national constitution.[1] But in the constitutions of some few of the states, we find a specific prohibition against retroactive legislation, eo nomine.

RETROACTIVE EFFECT AVOIDED BY CONSTRUCTION.

286. A statute will be construed to operate in futuro only (that is, it will not be given a retroactive effect by construction), unless the legislature has so explicitly expressed its intention to make the act retrospective that there is no place for a reasonable doubt on the subject.[2]

The reason for this rule is the general tendency to regard retroactive laws as dangerous to liberty and private rights, on account of their liability to unsettle vested rights or disturb the legal effect of prior transactions. "Retrospective laws being in their nature odious, it ought never to be presumed the legislature intended to pass them, where the words will admit of any other meaning."[3] And where the law is clearly and explicitly retrospective, it will still be subjected, in this respect, to a rigid interpretation, so that its retrospective features may not be further extended than is absolutely required by the language of the act.[4]

[1] Satterlee v. Matthewson, 2 Pet. 380.
[2] Auffmordt v. Rasin, 102 U. S. 620.
[3] Underwood v. Lilly, 10 Serg. & R. (Pa.) 97, 101.
[4] Thames Manuf'g Co. v. Lathrop, 7 Conn. 550.

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CURATIVE STATUTES.

287. The legislature may retrospectively validate transactions between private persons, which would otherwise fail to have the effect which the parties intended to give them, either in consequence of a want of capacity, or of a failure to observe formalities which the law imposed and which it might dispense with.

It is first to be noticed that the object of curative and confirmatory acts is to give effect to the intention of the parties, to enable them to carry into effect some transaction which they have designed and attempted, but which fails of its expected legal consequences only by reason of some statutory disability or some irregularity in their action. Hence it would not be competent, by an act of this kind, to make the transaction carry a legal effect which the parties did not contemplate, e. g., to turn an attempted mortgage into a deed absolute.

In the next place, statutes of this kind are intended to do justice, and they cannot be objected to by the party whose invalid contract or conveyance they validate. Such a party cannot claim that he has a vested right to insist upon the ineffectualness of the contract or conveyance. On the contrary, the law recognizes an equity in the other party to the transaction, and it is to this that the curative act gives effect.

But retrospective curative statutes cannot be allowed to operate to the detriment of the intervening rights of third persons. Thus if, after the execution of an invalid contract or conveyance, the person who made it deals with a third person, in good faith, in respect to the same subject matter, the rights thus acquired by such third person cannot be cut out by the validation of the prior contract or conveyance.[5]

The invalidity of the transaction may arise from the want of authority or capacity in the person who attempted to transfer rights to another. And this may be of two kinds, natural or legal. If it is of the former sort, the legislature cannot supply the lack of

[5] Thompson v. Morgan, 6 Minn. 292 (Gil. 199).

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capacity; if of the latter description, it may be remedied. For example, if one undertakes to transfer property which he does not own, or, by such a transfer, to effect a fraud upon the rights of third persons, his want of capacity to make a title is not such as the legislature may dispense with retroactively. And for a like reason, it could not give effect to a deed made by a lunatic. But on the other hand, legal disabilities, whether existing at common law or by statute, such as the disability of a married woman, a minor, or a spendthrift, could be removed at any time by an act of the legislature, and therefore their invalidating effect may be taken away, in particular cases, by a curative statute, when it is necessary to do justice and carry into effect the intention of the parties. When the invalidity of the transaction arises from irregularity in the action of the parties, or failure to observe technical requirements, it may be cured, provided the formalities neglected were such as the law established and might dispense with, and the defects were not jurisdictional.[6]

To illustrate the foregoing principles, we may cite the rule that, "when a deed or other conveyance is invalid by reason of the failure of the parties thereto to conform to some formality imposed by the statute, the legislature, which imposed the formality, may by a subsequent act cure the defect, and give the deed such effect as the parties thereto intended that it should have at the time of its execution."[7] Thus, a curative act validating deeds which were ineffectual to convey title only because the acknowledgment was informal, taken before a wrong officer, or otherwise defective, is good and valid.[8] But when a deed of a corporation is executed by the president and secretary under their private seals, and there is nothing to show that they were authorized by the directors to make the deed, this is not such an irregularity or defect as can be cured by a subsequent statute.[9] The legislature may authorize a county or other municipal corporation to subscribe to the stock of a rail-

[6] Single v. Marathon Co., 38 Wis. 363.

[7] Pelt v. Payne, 60 Ark. 637, 30 S. W. 426.

[8] Smith v. Gale, 144 U. S. 509, 12 Sup. Ct. 674; Bryan v. Bryan (Ark.) 34 S. W. 260; Shrawder v. Snyder, 142 Pa. St. 1, 21 Atl. 796; Carson v. Thompson, 10 Wash. 295, 38 Pac. 1116.

[9] McCroskey v. Ladd (Cal.) 28 Pac. 216.

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road company and to issue bonds to pay such subscription; and if, by reason of mistake, carelessness, or other cause, the conditions precedent to the exercise of such power by the municipality have not been complied with, the legislature can cure all irregularities by subsequent legislation, and make such contracts as valid and binding as if all the conditions precedent had been strictly complied with.[10]

STATUTES CURING ADMINISTRATIVE ACTION.

288. Defective legal proceedings, involving administrative or executive action, may be validated by retrospective statute in all cases where the legislature would have power to declare that the same acts, or the same manner of doing them, should in the future be valid and effectual, but not where the defects are jurisdictional.

If the invalidating defect concerns the rights of parties to such an extent that the transaction, thus defective, cannot be said to answer the requirement of due process of law, it is obvious that the legislature cannot give it validity by subsequent statute. But if the defect consists merely in the omission or neglect of some formality (that is, something which the positive law has required, but which is not inherently necessary to the validity of the transaction), or in an imperfect or irregular manner of complying with the requirement of some such formality, then the legislative authority is ample to cure the defective proceeding by a retroactive statute.

Tax Proceedings.

It is within the constitutional power of the legislature, under proper limitations, to pass general or special acts curing or validating irregular and defective proceedings in the assessment and collection of taxes. But this power is bounded by the general rule above stated. Proceedings in the assessment and collection of taxes which the legislature might have dispensed with, or made immaterial, in the statute under which the proceedings are taken, may be dispensed with or made immaterial by a statute passed after the

[10] Thomson v. Lee Co., 3 Wall. 327; Granniss v. Cherokee Tp., 47 Fed. 427; Ball v. Presidio Co. (Tex. Civ. App.) 27 S. W. 702; Bell v. Railroad Co., 91 Va. 99, 20 S. E. 942.

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proceedings have been taken and acting retrospectively, and thus defects in those proceedings, or the omission altogether of proceedings which might have been originally dispensed with, may be cured.[11] But if the defect is jurisdictional, that is to say, if it goes to the root of the authority to act, if it involves the omission of a step which the legislature could not have dispensed with, or if it consists in an irregularity which the legislature had no power to declare immaterial, then it is beyond the reach of a curative statute.[12] For instance, if the tax itself was void, because levied for an unlawful purpose, or for any other reason, this is a defect which cannot be cured retrospectively.[13] So where power was conferred by the legislature to make an assessment, which actually was made, it is competent for the legislature by a retroactive law to cure any irregularity or defect in the form in which the power was exercised. But the total lack of any assessment of the taxes cannot be cured, for this would be a jurisdictional defect. Nor can curative laws be employed to legalize an assessment which is so fatally defective as to be entirely void, whether for want of jurisdiction or want of authority to make it.[14] It must also be remembered that notice to the tax payer and an opportunity for him to be heard in opposition to the assessment, or to its amount, is a jurisdictional requisite. No retrospective statute can waive such notice or cure the want of it, because the legislature could not have dispensed with it in advance.[15]

[11] People v. Turner, 145 N. Y. 451, 40 N. E. 400. Where the law requires tax assessors, before entering upon their duties, to take and subscribe an oath, and the assessors take, but do not subscribe, the required oath, it is competent for the legislature, by a subsequent curative statute, to validate the assessment made by them. Smith v. Hard, 59 Vt. 13, 8 Atl. 317. So, where a tax levy is invalid because the assessors omitted to include property which should have been included, the legislature may validate it. Van Deventer v. Long Island City, 57 Hun, 590, 10 N. Y. Supp. 801.

[12] Exchange Bank Tax Cases, 21 Fed. 99; Forster v. Forster, 129 Mass. 559; Carlisle v. Goode, 71 Miss. 453, 15 South. 119.

[13] Conway v. Cable, 37 Ill. 82; Hart v. Henderson, 17 Mich. 218.

[14] Reis v. Graff, 51 Cal. 86; Hart v. Henderson, 17 Mich. 218; People v. Lynch, 51 Cal. 15. See Mayor, etc., of Baltimore v. Ulman, 79 Md. 469, 30 Atl. 43; Louisville & N. R. Co. v. Bullitt Co., 92 Ky. 280, 17 S. W. 632.

[15] Breaux v. Negrotto, 43 La. Ann. 426, 9 South. 502.

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Public Sales.

Sales made by public officers or under legal authority or in pursuance of legal proceedings, such as sales on execution, or on foreclosure of a mortgage, or under a decree of partition, or by executors or guardians under orders of the probate court, which are ineffectual only in consequence of some defect or irregularity which the legislature might have rendered immaterial in advance, and which does not affect the substantial rights of parties interested, may be made good by retrospective legislation.[16]

CURING DEFECTIVE JUDICIAL PROCEEDINGS.

289. Retrospective curative statutes may be employed to remedy such defects in judicial proceedings as amount to mere irregularities, but not to supply want of jurisdiction.

Where there is a want of jurisdiction, all proceedings had in the case are utterly void. If a statute should give them validity and effect, it would amount to a usurpation of judicial power by the legislature. For the rights of parties would in that case be determined, not by the judgment of the court, but by the statute alone.[17] But in the case of merely irregular or defective proceedings, it is otherwise. For here the fault lies in some particular which the legislature might have rendered immaterial or dispensed with in advance. Thus, in cases where the jurisdiction has attached, and there has been a formal defect in the proceedings, where the equity of the party is complete, and all that is wanted is legal form, it is within the recognized power of the legislature to correct such defect and to provide a remedy for the legal right.[18]

[16] Ackerson v. Orchard, 7 Wash. 377, 35 Pac. 605; De Zbranikov v. Burnett (Tex. Civ. App.) 31 S. W. 71; Finlayson v. Peterson (N. D.) 67 N. W. 953.

[17] For instance, where judicial proceedings are void because of an entire want of notice to a party whose rights are affected thereby, a subsequent statute assuming to validate such proceedings is not valid. Board of Com'rs of Wells Co. v. Fahlor, 132 Ind. 426, 31 N. E. 1112.

[18] Lane v. Nelson, 79 Pa. St. 407.

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